THE

LAW QUARTERLY REVIEW.

No. XV. July, 1888.

A NOTE ON THE FACTORS ACTS.

AS a bill for the consolidation or codification of the Factors Acts is in preparation, it may not be amiss to direct attention to one or two points of some importance which present themselves on a consideration of those statutes. Almost all the provisions contained in the several Factors Acts, 1823, 1825, and 1842, deal with cases where a person intrusts goods or the documents of title to a factor or agent for sale, and such agent disposes of them without the authority or in excess of the authority given to him by his principal: and the effect of the enactments is to give, under certain circumstances, a good title to the person to whom the agent has so disposed of the goods or documents.

There are however three sections of the Factors Act, 1877, which deal with cases of a very different kind and to which very different considerations apply:—

The third section of that Act relates to the case of the owner selling the goods and himself afterwards disposing of them to another person before the first purchaser has obtained possession of the goods or documents of title. The section is in the following words:—'Where any goods have been sold and the vendor or any person on his behalf continues or is in possession of *the documents of title thereto*, any sale, pledge or other disposition of the goods or documents made by such vendor or any person or agent intrusted by the vendor with the goods or documents within the meaning of the principal Acts as amended by this Act so continuing or being in possession, shall be as valid and effectual as if such vendor or person were an agent or person intrusted by the vendee with the goods or documents within the meaning of the principal Acts as amended by this Act, provided the person to whom the sale, pledge or other disposition is made has not notice that the goods have been previously sold.'

This enactment, it is well known, owes its origin to the judgment in *Johnson* v. *The Crédit Lyonnais* (3 C. P. Div. 32), and was intended to overrule or do away with that decision. It is evident however that the section has a far wider effect. It applies not only to the case where the documents of title are left by the purchaser in the vendor's possession, but also to the case where the vendor has got possession of them after the sale: it applies not only to the case where the second purchaser has the documents transferred to him at the time of his purchase, but also to the case where he may be even unaware of their being in the vendor's possession. Such being the scope and extent of this enactment, there seems no reason why it should not be still further extended to every case in which the goods are left in the vendor's possession, instead of being confined, as it appears to be, to the case of the *documents of title* being in his possession.

Moreover, there is no doubt the section is very imperfectly framed. It could never have been intended to apply (although literally construed it does so apply) to a case where the second purchaser has not obtained possession of the goods or documents of title, for in such case there is no reason whatever why he should be preferred to the first purchaser: on the contrary, it is manifest that he ought to have no such preference.

From these considerations it seems to follow that instead of this third section it should be in substance enacted that the title of a purchaser who does not take possession of the goods or documents of title should be postponed to that of a person who has *bona fide* obtained possession of such goods or documents.

As regards the fourth and fifth sections of the Factors Act, 1887, on a careful perusal of them it will be found very difficult exactly to ascertain for what purposes they were introduced. For the fifth section covers the case provided for by the fourth section, and indeed it is not easy to conceive any other case which it can embrace. It will therefore be sufficient to re-enact in substance the fourth section and to leave out the third altogether.

As regards all the other provisions of the Factors Acts, 1823 to 1877, relating to the disposition of goods by factors or agents, they have been held to apply only to agents intrusted with them for the purpose of *sale*. It may, however, be well worth while for lawyers and merchants to consider whether those provisions should not be extended to the case of agents intrusted with goods or documents of title for the purpose of obtaining advances on them, and who obtain such advances in the usual course of business.

I believe the general opinion of merchants and bankers would be strongly in favour of such an alteration in the law. I have also no

doubt that the mercantile world is very anxious since the recent decision in Lord Sheffield's case in the House of Lords that a similar protection should be afforded in the case of brokers intrusted with negotiable instruments for the purpose of obtaining advances on them.

That anxiety, as I hope to show on a future occasion, is justified by very valid reasons:—

The decision in Lord Sheffield's case certainly took the mercantile world by surprise, for in the case of *Goodwin* v. *Robarts* (L. R. 1 App. Cas. 476), decided in the year 1876, the Bankers were held entitled to retain the negotiable instruments on which they had advanced money, although they took them from a broker. It is true that it was not *proved* in that case that the Bankers knew that the broker was not the owner of the securities, but there can be scarcely any doubt that in fact they had such knowledge. The very eminent Counsel who argued the case did not think it necessary to prove that fact, nor was it in any way suggested by any of the noble and learned Lords who delivered their opinions in the case, that a person who advances money on negotiable instruments to an agent known not to be the owner of them, is put upon inquiry as to the broker's authority. It seems to have been generally assumed that a person who advances money *bona fide* on negotiable instruments acquires a good title and need not inquire into the authority of the agent from whom he receives them.

ARTHUR COHEN.

THE LOCAL GOVERNMENT BILL.

MOST persons who are not lawyers find Mr. Ritchie's Bill too difficult for them. They are not familiar with the complex institutions which it seeks to modify, nor with the principles which give unity to the numerous changes which it seeks to effect. Its natural arrangement has been somewhat distorted in order to increase its chances of becoming law. Long as it is in appearance, it is still longer in reality. For by a few words of Clause 76 it incorporates nearly half of the provisions of the Municipal Corporations Act of 1882, one of the most voluminous Acts on the Statute-book. Yet in its essence the Bill is simple enough. The law of local government may be grouped under four principal titles:—I. Constitution of the several kinds of local authority. II. Apportionment of duties between them. III. Administrative rules determining the mode of performing each of these duties. IV. Organization of local finance. If we except the licensing clauses, which were an excrescence on the symmetry of the Bill and have now been abandoned, very few of its provisions come under the third title. But it makes a revolution in the law comprised under each of the other titles. It sets up a new system of local authorities, entrusts them with a new combination of duties, and places their finance on a new footing. Let us take these changes one by one.

I. Changes in the constitution of local authorities.

Speaking generally, we may say that the Bill has two objects in view. In the first place it proposes to extend all over England a system of local administration hitherto confined to corporate towns. In the second place it proposes to combine town and country districts alike under a body invested with higher powers, although fashioned on the same municipal model. It but slightly affects the lowest grade of local organization. It introduces a certain uniformity into the intermediate grade. The highest grade it transforms altogether. The parish it neither abolishes nor reforms. It leaves untouched the board of poor-law guardians and the school-board. These bodies already exist as independent authorities in the municipal borough. Their survival in country districts is quite compatible with that uniformity in town and country which the Bill seeks to promote. But beside them it sets up a new local authority, the district council. It also substitutes for the Quarter Sessions the county council. Although the Bill

begins with creating the county council, we shall find it more convenient to begin with considering the intermediate authority. It is the more elementary of the two.

By what steps does the Bill proceed to establish a new municipal authority in every district?

It uses as far as possible the existing local divisions. The Public Health Acts have already divided the whole of England into sanitary districts, urban or rural. But most of these sanitary districts are older local divisions re-named. An urban sanitary district is an urban area governed either by a town council, or by a local board, or by improvement commissioners. A rural sanitary district is co-extensive with a rural union, unless part of the union has been brought within the bounds of some urban sanitary district. In a rural district such of the guardians of the poor as are chosen by the ratepayers of the district have the powers and duties of a sanitary authority. The Bill, whilst adopting the sanitary district, establishes in every such district which did not already possess it an authority exactly similar in constitution to a town council. The distinguishing feature of a town council is its democratic constitution. In its election every resident ratepayer has an equal share, and is entitled to offer himself as a candidate. In the election of most other local bodies property gives a plural vote, and a property qualification is essential for candidates. The extension given to the municipal system is of more practical consequence in the district than in the county. For it is in the smaller area that men of small means will first press to take office.

The new district council supersedes not only all sanitary authorities other than town councils, but also all the existing highway authorities, namely, several hundred highway boards and several thousand parish surveyors of highways. It supersedes all the authorities charged with the execution of the Burial Acts. It also supersedes a variety of authorities created in particular places for particular purposes. Lastly, in the few cases where a local board has hitherto existed side by side with a town council, it is merged in this last. By these changes much is gained in uniformity and in simplicity. Yet in every district there will still be local authorities of three classes; the general local authority created by the Bill, the authority which administers the poor-law, and the authority which administers the Education Acts. The two last are virtually one in every parish which has no school-board, since the school attendance committee is always composed of guardians of the poor. But the district council and the board of guardians are necessarily distinct, for they have totally different constitutions. We are far from saying that this arrangement is a bad one. The

administration of the poor-law is a difficult business, which becomes more and more difficult as it becomes more and more a favourite topic with social and political mischief-makers. The other duties of local administration are quite enough for a new body, whose efficiency must for some time be matter of conjecture. Similar reasons justify the preservation of the school-boards. There will remain some confusion of areas. For the sanitary district and the poor-law union do not always coincide. The method of the Bill is not to remove such anomalies, but to give power for their removal.

As the poor-law union remains intact, the parish remains with it. But every reduction of the power of the board of guardians reduces the consequence of the parish, which is the guardians' constituency. That consequence is partly transferred to the wards into which the new districts will be divided. Much has lately been said about the necessity of reviving the parish. But it must be remembered that the parishes are mostly small, and often very awkward in shape. Before they could be made serviceable, they must be shaped anew, grouped or divided to an extent which would injure their old associations and excite much ill-will. Even when remodelled, they would be only of limited use. It is absurd to think of undoing every local reform of the last fifty years, and of restoring the relief of the poor and the care of the highways to little groups of thirty or forty families. Bulgaria or the Punjab may be a better ordered country than England, but England cannot therefore copy the institutions of the Punjab or Bulgaria. Yet the confusion of primary areas, which the Bill rather augments than lessens, is a real evil and will give work to subsequent reformers. The district must be preserved; but within the district room may be made for the parish.

Then the Bill establishes in every county a county council. This also is framed on the borough model. The chairman, however, must have the qualification of a justice of the peace. For the election of councillors the county will be broken up into electoral divisions, and in forming these, population is chiefly to be considered. As to the boroughs which will remain in the county, their proportion of members in the county council will be fixed by the Local Government Board. A borough returning only one councillor will form an electoral division by itself. In a borough which returns more than one councillor, the town council, and in the rest of the county the Quarter Sessions, will decide what the electoral divisions shall be. Only it is provided that no electoral division shall be made up of fragments of two or more districts. Everywhere the liberties and the franchises are to be merged in the

adjoining counties. But the ridings of Yorkshire and the divisions of Lincolnshire are to be treated as counties by themselves.

The final decision of the question as to which boroughs shall be included in the county and represented on its council is the product of two contending desires. On the one side there was the desire to set up a strong county government, which should relieve the imperial government of part of its work and also bind together all the subordinate authorities in the county. This desire would lead the reformer to reduce as far as possible the number of independent boroughs. On the other side was the desire to conciliate local patriotism and local jealousy, which has led the reformer to enlarge the list of boroughs enjoying immunity from the county jurisdiction. This feeling has prevailed, and has given the privileges of a separate county to every borough of 50,000 inhabitants, besides confirming those privileges to certain smaller boroughs, such as Exeter and Canterbury, which have always enjoyed them. Thus the prevailing character of the county will continue to be rural.

II. Apportionment of duties between the several local authorities.

First, as regards the district councils. Although these are uniform in their constitution, their powers differ considerably. Such district councils as are also town councils preserve their old powers, if we neglect certain functions transferred to the county from small boroughs. Thus every borough of more than ten thousand inhabitants will retain the command of its own police. Again the district council in every instance takes over the functions of the former sanitary authority. But these were necessarily more important in urban than in rural districts; and thus the district council which succeeds a local board or board of improvement commissioners will have more work than a district council which succeeds to the guardians in their capacity of sanitary authority. Then the district council takes all the duties of the old highway authority, except the care of main roads, which is now given to the county. But the roads in South Wales and the Isle of Wight are left in charge of the former highway authorities. These parts of the kingdom have administered their highways on a peculiar system which has answered very well, and is to be preserved. The district council is also entrusted with the execution of the Burial Acts, the Lighting and Watching Acts, and various other Acts of less consequence. Lastly, the district council acquires certain powers now exercised by justices out of sessions, such as the power of granting pawnbrokers' certificates, and the power of changing the date at which a fair is held, or of abolishing it altogether. District councils jointly interested in any matter are empowered to act through a joint committee. This is a valuable

privilege. Experience has shown, for instance, that a single medical officer appointed by a number of sanitary authorities acting together and paid a good salary is much more efficient than several medical officers, each acting for a single authority, and receiving only a nominal payment.

Secondly, as regards county councils. The powers of the new county councils form a singular assemblage. It takes over the administrative work of the Quarter Sessions of the county. But to this rule there are one or two important exceptions. The Quarter Sessions are still to appoint the chief constable of the county. They are to share the control of the police with the county council. For this purpose a standing joint committee is to be appointed. Joint committees of the Quarter Sessions and the county council may be appointed for any other purpose which concerns both bodies. This provision, also, may be of great use in administration. Then the Quarter Sessions may still appoint a committee to visit the lunatic asylums. Not only the judicial business of hearing appeals against rates, but the financial business of assessing to the county rate is retained by the Quarter Sessions. Finally, all powers not expressly taken from the Quarter Sessions are by a general proviso reserved to them.

The relation of the county council to the councils of those boroughs which are included in the county is a little intricate. The Bill divides such boroughs into three classes. (1) Boroughs having a court of Quarter Sessions and a population of at least 10,000. (2) Boroughs having a court of Quarter Sessions and a population of less than 10,000. (3) Boroughs which have neither a court of Quarter Sessions nor a population of 10,000. In boroughs of the first class the town council retains practically all its administrative functions. In boroughs of the second class the town council loses such functions as have hitherto been assigned to the town councils of Quarter Sessions boroughs only. In boroughs of the second, and also in boroughs of the third class, the town council loses certain other functions which have hitherto belonged to all town councils. Only one of these, namely, the function of maintaining a separate police, is of any gravity whatsoever. For this innovation a precedent had been given by the statute which forbids the establishment of a separate police in any newly incorporated borough with less than 20,000 inhabitants. Thus the transfer of power from town councils to county council is as limited as is compatible with setting up a real county authority, which should link town and country together.

The county council takes from the expiring highway authorities the charge of the main roads. Hitherto the highway authorities

have maintained these roads and defrayed one-fourth of the cost of so doing. One-fourth was contributed by the Treasury, and the remaining half by the county. But even now an urban authority may within a limited time claim the right of repairing a main road within its jurisdiction.

Certain other powers, without being taken from any local authority which now enjoys them, are communicated to the county council. Such a power is that of enforcing the law against the pollution of rivers, formerly possessed only by the sanitary authority, and such is the power of making bye-laws for the better government of the county, a power modelled upon that which a town council exercises within its borough.

Lastly, many powers not hitherto regarded as local are conferred upon the county council. The eighth clause confers upon it those powers of the Secretary for the Home Department, of the Board of Trade, and of the Local Government Board, which are enumerated in the first, second, and third parts respectively of the first schedule. Some of these powers are important; but most of them can be only occasional in their exercise. The same clause provides for a further delegation of power as from time to time may seem desirable. By Order in Council approved by Parliament any powers and duties of any of the above authorities or of any other department of state may be delegated to the county council. This sweeping enactment is qualified by the following provisoes: that the powers and duties so transferred must have been created by statute; that they must be administrative in character, and that they must be such as arise within the county. Even so, there is a wide field left for experiment. It will be interesting to observe to what extent and with what success this clause will be used. Every application for a new charter to a borough must in future be made through the county council, but it does not appear whether or no the county council is to have any discretion in respect to the application.

III. Changes in local finance.

Those proposed in this Bill are of the utmost consequence. Three in particular call for notice. First, as to the aid which the imperial is to afford to the local exchequer, the Bill seeks to effect several distinct objects. It seeks to complete the severance of local and imperial finance begun last year by the creation of the Local Loans Fund. It enacts that in future the local authority shall not receive grants out of the Consolidated Fund, but shall intercept the whole or a fixed proportion of certain taxes which to that extent will appear as items, not of national, but of local revenue. It seeks to redress the unequal pressure of

rates upon real property by choosing for the above purpose such taxes as are levied upon personal property. Lastly, it seeks to overcome the local prejudice in favour of outdoor relief as being economical by enacting that the proportion of the probate duty assigned to local purposes shall be divided among the counties with reference to the amount of indoor relief given in each, and that out of the grant a capitation shall be allowed for every person receiving indoor relief in the county. Then the Bill contains a remarkable series of provisions respecting local loans. The enactment, Clause 66, that no county council shall contract debts to the amount of more than two years' rateable value of the county reads almost like an injunction to be wasteful. All the outstanding debts of local authorities in England, monstrous as they are, do not amount to such a sum. No English county is at present indebted on the county account to more than a fortieth of its rateable value. It is inconceivable that a minister should imagine and a cabinet approve anything so outrageous. Indeed the multiplied facilities for borrowing given by this Bill constitute its most serious blemish. Thirdly, the Bill provides that both the district and the county councils shall every year make a regular budget of income and expenditure. This is an excellent provision, but would be more useful if the law required such budgets to be published in the local newspapers.

We have said nothing about the now defunct licensing clauses. Nor have we said anything about the special provisions for London. These are skilfully adapted to a peculiar set of circumstances. On the one hand so great a city needs some strong, dignified, and representative authority. On the other hand the concentration of power and business in the hands of a town council of the usual type would for London be useless and dangerous. The proposed county council would probably be the best possible municipal assembly for London. But the reform of local administration in London is too extensive a subject to be dismissed in a paragraph.

F. C. Montague.

PUBLIC MEETINGS AND PUBLIC ORDER.

V. The United States.

THE United States of America, for the most part, adopt and act upon the common law of England as the basis of their jurisprudence. This statement applies not only to the early common law strictly so called, but also to such early English statutes as involved general fundamental principles, and were in their nature permanent and applicable to our situation and circumstances. Thus the statutes 32 Henry VIII. c. 9, as to buying pretended titles, 33 Henry VIII. c. 1, against cheating by false tokens, 13 Eliz. c. 5, as to fraudulent conveyances, 43 Eliz. c. 4, in regard to charitable gifts, and many others, have in most states the force of law, though never formally re-enacted here by any legislative tribunal. The same remark applies, to a certain extent, to the criminal law. The general fundamental principles of the English criminal law, with its definitions of crimes and tests of guilt, are generally followed in this country; but the English criminal statutes have not been adopted to the same extent as those relating to merely civil rights of property. This is especially true as to statutes prescribing remedies or modes of procedure. With this preliminary observation we come to the subject of this article.

The constitution of the United States provides that Congress shall make no law 'abridging the freedom of speech or of the press, or of the right of the people peaceably to assemble and to petition the government for a redress of grievances.' And a similar principle is found in some state constitutions that 'the people have a right in an orderly and peaceable manner to assemble to consult upon the common good.' It is generally supposed that these provisions are only a constitutional embodiment of the English Bill of Rights declared in stat. 1 William and Mary, second session, ch. 2 (1688). Whether this statute practically repealed the earlier one of 13 Chas. II. c. 5, limiting the number of petitioners to twenty (unless approved by certain magistrates), as maintained by Mr. Dunning in the House of Commons (New Ann. Reg. 1781, vol. 2), or left it still in full force, as asserted by Lord Mansfield in the trial of Lord George Gordon (Dougl. 591), it is certain that no such limitation or restriction of the right of petition exists in America under the foregoing constitutional provisions. With this understanding it may be safely assumed, we think, that the common law on the subject of

unlawful assemblies with their not unfrequent development into routs and riots, is not affected by our constitutional provisions, or by the 'freedom of speech' therein secured; and that the common law of England is the common law of America. Great 'freedom of speech' is allowed in expressing one's *opinions*, both of laws and lawmakers, but not in exciting the hearers to violate the one, or assail the person or property of the other. Possibly the public authorities in America have less jealousy and anxiety about such public meetings; possibly more toleration or at least more indifference about what may be uttered at them; possibly also our peace officers are more reluctant to interfere in the early stages of disorder than in the old country, or at least than was the case in former times; but with this qualification, and the further fact that the number required to constitute an unlawful assembly has in some states been changed by statute, the two countries are in substantial accord. We are warranted therefore, we believe, in thus stating the American law on this subject.

1. That is an 'unlawful assembly,' justifying an interference by the police, where three or more persons assemble to counsel or prepare for the accomplishment of some unlawful object, especially if that object be the commission of some felony or other crime. This is too obvious to need elaboration. An officer's right to arrest a *single* individual about to commit such an offence surely cannot be less when, from the encouragement and support of numbers, the danger is still greater that the felony will be accomplished. The meeting is simply a conspiracy on a larger scale.

2. That is an unlawful assembly where three or more meet to carry out some object legal and proper in itself, but by the use of illegal and unjustifiable means, such as threats, intimidation or actual violence.

3. It is equally an unlawful assembly, if the persons originally meet to accomplish such object by *only legal means*, but under the excitement of the occasion resolve or prepare to carry out their purpose by unjustifiable or illegal means. From that moment the meeting becomes an unlawful assembly, and is subject to all the consequences thereof.

4. The last two propositions apply equally to assemblies to accomplish some public object, effect some change in public laws, or reform some public and general grievance, as well as to meetings called to redress some private wrong or secure and maintain some private right. But public grievances, though real and pressing, can no more be remedied by force and violence (except by revolution) than imaginary private wrongs. The ballot and not the bullet is the constitutional method; the one is free, the other not.

It should be noted however that in America efforts to accomplish a change of laws by violence or intimidation have never been considered as *Treason*; since that offence consists only 'in levying war against the United States, or in adhering to their enemies.'

5. A public meeting therefore becomes unlawful so soon as from general appearances and all the surrounding circumstances it naturally excites terror, alarm and consternation in the minds of peaceable and law-abiding citizens; so soon as in the minds of rational and firm-minded men it is likely to endanger the peace and tranquillity of the neighbourhood. Of course the circumstances must be such as would naturally produce fear and alarm in men of reasonable firmness and courage, and not merely in the minds of timid women. When that condition of things exist, that moment the peace officer may intervene and disperse the assembly. Whether that state of things does or does not exist must be finally passed upon by a jury of the country in prosecutions arising out of such interference. No abstract rule can be laid down beforehand, but it is safe to say that in America the inclination of juries, as a rule, is to support law and order, and to protect the officer in the *bona fide* discharge of his apparent duty on such critical occasions. But while no formula or rule can be prescribed for determining the existence of an unlawful assembly, yet some circumstances are always indicative of such a character, and are generally relied upon as sufficient proof of the approaching storm. Thus if the persons meet at an unreasonable hour; if they come armed with deadly weapons; if they listen to and applaud inflammatory speeches which counsel force and violence; if they display banners holding up to ridicule and contempt other persons and organizations in the community, the natural tendency of which is to arouse the other's passions, and provoke an attack upon the meeting; if they approve or propose to march tumultuously in a body, with their arms and banners, to some other place where parties holding opposite sentiments are assembled, or to a part of the city where the latter reside or congregate, these, and many other circumstances, tend to show minds so 'fatally bent on mischief' that friends of peace and order may well be alarmed, and request the peace officers to interfere. The latter are not bound to wait until the proceedings have ripened into a positive riot. It is the right and duty of peace officers to prevent such a consummation of the unlawful purpose.

6. When the right and duty of the peace officer to interfere once arises, that right is to make an *effective* interference. If the assembly refuses to disperse upon his order, he may arrest the ringleaders, and for that purpose may call upon and require all bystanders to assist. If resistance is made, he and his assistants

may use all necessary and reasonable means to overcome such resistance, even to the use of deadly weapons, and if death of the guilty parties is thereby caused, the homicide is justifiable. On the other hand, if the officer or his assistants are slain, it is nothing less than murder; not only in those who actually commit the deed, but also in all members of the meeting who aid and abet the leaders in such resistance.

7. It is not only the right but the positive duty of all by-standers, when called upon, to assist in arresting the participants in a riotous assembly, and they are liable to criminal prosecution if they refuse such aid. Indeed they may in extreme cases, in the absence of magistrates and public officers, arm themselves and put down a riot, and if slain in the exercise of reasonable and necessary means of preserving the peace, their death is wilful murder in the rioters.

8. If, as generally understood in America, notwithstanding the doubts entertained in England at the time of the London riots of 1780, private citizens have a right to interfere and to put down a riot, or quell a disturbance of the public peace, even without any order or request from magistrates or peace officers, it necessarily follows that officers *de facto* though not *de jure* must have such right; and therefore are protected in the exercise of it. They do not lose their rights as citizens, merely because they wear an officer's uniform, though their official appointment may be open to criticism.

Much judicial authority exists in America for this proposition, both in the case of riots and also in arrests of individual wrong-doers.

9. This statement of abstract principles may be best illustrated by a few notable instances which have occurred in different states. In some of these cases there was an actual riot, but the principles of interference in unlawful assemblies are believed to be the same as in positive riots. Indeed an unlawful assembly as above described is only an incipient riot.

(1) About the year 1844 a new political party was organized in several of the states, called the 'Native American Party,' one object of which was to procure an alteration in the laws relating to the naturalization of foreigners, by which additional stringency and safeguards should be established, and the power of the foreign vote at the polls be somewhat restricted.

This step created great excitement among the foreign population. On the 3rd of May, A.D. 1844, a public meeting of about three hundred persons assembled in Philadelphia, in the state of Pennsylvania, to promote the objects of the new association. After

the organization of the meeting, and while one of the party was addressing the assembly, it was interrupted by a large number of foreigners. A scene of confusion arose, the opponents of the meeting rushed forward, pulled down the platform and dispersed the meeting. The persons present then adjourned to a subsequent day, but were no sooner assembled on that occasion than the meeting was again interrupted by a number of Irishmen, who fired upon the gathering, and one member of the American party was killed. This occurrence aroused the most intense excitement in the public mind, and an indignation meeting was held a few days afterwards, on the 7th of May, by those favouring the new party, the call to which contained these words, 'Let every man come prepared to defend himself;' and an American flag was displayed, bearing the inscription, 'This is the flag that was trampled upon by the Irish papists.' The assembled people marched tumultuously into the Irish quarter, where in a general mêlée a man named Matthew Hammitt was killed by a party of the Irish. John Daly, one of the latter, was indicted for the murder of Hammitt, and on his trial the presiding judge thus laid down the law:—

'If the call for the first meeting of native Americans, held May 3rd, was addressed exclusively to persons favourable to its objects, the interference of others hostile to its proceedings, and the breaking up and dispersion of the meeting by them, was a gross outrage on the rights of those who called it. It was a riot of a flagrant kind. Any body of citizens having in view a constitutional or legal purpose have the right peaceably to assemble together for its consideration and discussion. Any attempt by another body of citizens opposed to the objects of the assembly to interrupt and disperse it, is not to be tolerated. Every attempt by force and violence to interfere with the right of citizens to meet and discuss proposed lawful measures, is a direct infringement of a vital principle of our institutions, state and national.

'But a public meeting, otherwise legal, may from the manner, place and circumstances of its organization become an unlawful and even a riotous assembly. Thus if the indignation meeting of the 7th of May, at which Hammitt was killed, was convened under a notice to those who should attend "to come armed;" and if in pursuance of such suggestion it was attended by persons armed with deadly weapons, and if the meeting so summoned and assembled proceeded to march in a body to a part of the city chiefly inhabited by a foreign population, openly exhibiting arms and displaying banners with inscriptions offensive to such foreign citizens, the assembly sinks from the dignified position of a body of freemen, exercising a great constitutional right, into a mere riot.'

And as to the right of officers to interfere with and put down such an unlawful assembly, the same learned judge in his charge to the grand jury, which had the duty of investigating this riot, thus instructed them:—

'An unlawful assembly may be dispersed by a magistrate whenever he finds a state of things existing calling for interference in order to preserve the public peace. He is not required to postpone his action until the unlawful assembly ripens into an actual riot. For it is better to anticipate more dangerous results by energetic intervention at the inception of a threatened breach of the peace, than by delay to permit the tumult to acquire such strength as to demand for its suppression those urgent measures which should be reserved for great extremities. A magistrate may not only himself arrest the offenders, but may authorize others to do so by a mere verbal command, and all citizens present whom he may invoke to his aid are bound to promptly respond to his request and support him in maintaining the peace. When the sheriff of the county, mayor of the city, or other known conservator of the public peace, has repaired in the discharge of his duty to the scene of the tumult, and there commanded the dispersion of the unlawful or riotous assembly and demanded the assistance of those present to aid in its suppression, from that instant there can be no neutrals.

'The line is then drawn between those who are for and those who are against the maintenance of order. All who join in unlawful and riotous assemblies are responsible criminally for the acts of their associates done in the furtherance of their common object. When engaged in the suppression of dangerous riots the sheriff and associates are authorized to resort to every means necessary to maintain the public peace and prevent the commission of criminal outrages against persons or property. They may arrest the rioters, and detain and imprison them. If they resist the sheriff and his assistants in their endeavour to apprehend them, and the danger is pressing and immediate, the sheriff and his assistants not only may, but are bound to do their utmost to put down riot and tumult, and preserve the lives and property of the people. If the rioters resist the sheriff and his assistants in his endeavour to apprehend them, and continue their riotous actions, the killing of them under such circumstances is justifiable. This doctrine is undoubtedly sound, both in reason and in law, in case of an individual crime. And if possible it is still clearer when similar enormities are attempted by vast and riotous assemblies, and when the known officers of the law are engaged in the endeavour to prevent their consummation. The protection given to officers of justice engaged in enforcing the laws is full and unequivocal. If persons having

the authority to arrest or otherwise to execute the public justice, are using proper means for that purpose and are resisted in so doing, and the party resisting in the struggle is killed, it will be murder in all who take part in the resistance.'

(2) In the year 1849 serious riots occurred in New York City, called the 'Astor Place Riots,' arising from some popular expressions of disapprobation at the performance in the Astor Place Opera House, accompanied by an attempt to fire the theatre building. The grand jury, in their investigation of the disturbance, were thus instructed by Judge Daly: 'Any tumultuous assembly of three or more persons brought together for no legal or constitutional object, *deporting themselves in such a manner as to endanger the public peace and excite terror and alarm in rational and firm-minded persons, is unlawful;* and whenever three or more persons in a tumultuous manner use force or violence in the execution of any design wherein the law does not allow the use of force, they are guilty of a riot.'

And as to the power of interference and arresting the parties participating in such unlawful assemblies, Judge Daly declared: 'All magistrates are empowered to preserve the public peace, and justified in using whatever degree of force may be necessary for that purpose. In England, from which we derive the common law, the extent to which the authorities may go, and the manner in which they shall employ extreme force, has been a matter of statute regulation from the time of Edward IV. These statutes have undergone various changes and modifications, and such of them as were passed prior to our Revolution not being applicable to our form of government, are not in force in this state. The extent to which force may be used, and the manner in which it should be employed, rests with us therefore upon the principles of the common law, in connection with certain statutory provisions of our own which have been enacted. From the long existence of the English statutes it has been supposed that the right to employ extreme force for the suppression of riots was derived solely from the statutes; but Chief Justice Hale, a great authority on the common law, and one of the most fearless and upright of judges, says that the right does not depend upon the statute, but exists at common law; that any magistrate or sheriff, if a riot cannot be otherwise suppressed, may have the use of such force as shall be necessary, and that if, from the employment of it, death ensues, the act is justifiable.'

(3) About the year 1855, a stringent liquor law was passed in the State of Maine, popularly called 'The Maine Law,' which prohibited all sales except by the municipal authorities, and authorized them to purchase, keep and sell under certain restrictions. This

law was very unpopular in large cities. In Portland, in that state, the Mayor, Mr. Neal Dow, supposed to be the author of the law, purchased a quantity of liquors, intended for sale by the city authorities under the law, and which were stored in one of the city buildings. On the night of the 2nd of June, 1855, a large body of people, men and boys, amounting to over a thousand, assembled around the depository of the liquors, evidently bent on mischief, probably intending the destruction of said property. The building was defended by the authorities civil and military, and the excitement was intense. The Riot Act was read by the Mayor, and the crowd ordered to disperse. They heeded not the order, and the tumult continued to increase in violence and desperation. The building was assailed by stones and other missiles, and a number of the police and military were wounded. The latter were ordered by the Mayor to fire on the crowd, and one of the ringleaders named John Robbins was killed. A coroner's inquest was held and unanimously found that he was killed by some one, acting under the Mayor's authority, in the defence of the city's property from the ravages of an excited mob, of which said Robbins was one. The right to use such extreme measures was so obvious that no indictment was ever found against the authors of his death. It furnishes a notable illustration of the fickleness of popular favour or disfavour, that within the last few weeks the same democratic party of Portland, whose members in 1855 were supposed to be most hostile to Neal Dow and his temperance views, have nominated him for mayor of the same city, although he has not himself changed his sentiments on the liquor question which caused the riot of 1855.

These principles were frequently reaffirmed during the last thirty years, which period we pass over, in order to present a recent instance, of very great importance, which clearly demonstrates that the sound and salutary doctrines of the common law have not been emasculated of their strength and vigour by any supposed freedom or latitude in American life.

(4) During the winter of 1885–6, and for some time previous, great excitement existed among the working-men of Chicago, in the state of Illinois, and some other places, in their efforts to compel employers to introduce eight hours as a day's labour. Organizations were established for the overthrow of private property, and the holding of all capital in common. Inflammatory addresses were made, and appeals published by the leaders clearly advising the use of force and violence to accomplish a social revolution, even to taking the life of policemen and others who were opposed to their views. The excitement on both sides ran very high. On the 4th of May,

1886, a public meeting was held in Chicago by the working-men and socialists, for which preparations had long been making to resort to the extremest measures should they be interrupted by the police. This meeting was addressed by three persons named Spies, Parsons, and Fielden, each of whom had before advised violent and even bloody measures. About half-past ten in the evening, while Fielden was speaking, a band of policemen marched into the crowd and ordered the meeting to disperse. The moment the order was given some one in the crowd threw a dynamite bomb among the policemen, which exploded and instantly killed one of the policemen named Degan. Pistol shots immediately followed, and six more policemen fell, and sixty others were seriously wounded. *It was not known who threw the bomb* which caused the death of Degan, but eight of the prominent men among them, including the above-named, were indicted and convicted of his murder. The indictment included one Lingg, the maker of the bomb, and others who were not proved to have been actually present at the meeting of May 4th, but were shown to be in full sympathy with its objects, and to have clearly advised force and violence on this occasion. The unlawfulness of the assembly was clearly established; the right of the policemen to interrupt it could not be doubted; their own demeanour was unexceptionable, and the deadly attack followed instantly upon their order to disperse. The principles before laid down in this article were assumed as undisputable, and the main struggle was whether the evidence was sufficient as matter of fact to connect the particular persons indicted with the murder of Degan, but the conviction of the whole eight was sustained by the Supreme Court of Illinois, and afterward by the Supreme Court of the United States at Washington. One of the guilty parties committed suicide in prison, three were confined in the state penitentiary, and *four were executed*. This remarkable trial is called 'The Anarchists' Case.'

More instances might be added, but sufficient have been given to show that notwithstanding an apparent unconcern in our community at much rash and even desperate conduct on the part of lawless men, yet when the American people are fairly aroused they fully enforce the maxim *salus populi suprema lex*.

EDMUND H. BENNETT.

EARLY ENGLISH LAND TENURES.

I. Mr. Vinogradoff's work [1].

WITHIN the last few years a new theory on the origin and growth of village communities has been produced as well in England as in America and France. Messrs. Seebohm, Ross, and Fustel de Coulanges have tried to establish the fact that communal ownership of land is not at all the archaic institution it was generally supposed to be. It has been maintained that it dates only from the period when the manorial system was already operative; that serfdom has been its chief creator; and that free village communities were totally unknown until comparatively recent times.

In its general lines, the new explanation given to the origin of village communities was but the revival of the well-known theory of the French and German 'feudistes,' who, trying to define the mutual relations of landlord and tenant as to the use of common pasture and wood, ascribed to the manor the exclusive ownership of the soil, the tenants possessing no other rights on it but those created by the good-will of the landlord, by his sufferance, or by covenant.

Thirty years ago a Russian scholar of great renown, Chicherin, of Moscow, tried to apply the same theory to the history of the Russian 'Mir,' but he failed, and, until quite recently, nobody expressed any doubt as to the remote antiquity of the present system of peasant ownership in Russia.

As soon as the views of Seebohm and Fustel de Coulanges were published, Russian historians and lawyers felt bound to convince themselves how far these views were in accordance with documentary information.

Hence a series of articles and monographs, among which the work of Professor Vinogradoff is, without doubt, the most important.

I have much pleasure in saying that the general conclusions to which the author has arrived plead in favour of the view taken by Russian historians as to the origin of the 'Mir.' Mr. Vinogradoff expresses no doubt as to the existence of free communes long

[1] Inquiries into the Social History of Mediæval England. By Paul Vinogradoff. Petersburg, 1887.

before the creation of the manor, the class of freemen being preserved during whole centuries not only in the Danish provinces, where they are known under the name of sokmen, but also in other parts of England, where the terminology used by Domesday Book might easily induce the scholar to take them for a servile class. He also rejects every relation between the open-field system and that of cultivating the ground in common, the latter being totally unknown to the Anglo-Saxons. Once more in accordance with the Russian historical school, he attributes the origin of the 'virgate' system to the general desire of equalising the shares possessed by each household in the common fields, with regard to the quality of ground and the advantages of its situation.

Mr. Vinogradoff has made great use of the rentals and cartularies of the thirteenth century, as also of the court and hundred rolls, and the inquisitions and partial surveys that followed the composition of Domesday Book. He has minutely studied Anglo-Saxon laws and charters, and the works of the early English lawyers, especially Bracton, whose note-book he was fortunate enough to identify.

Beginning with the period on which he has found the greatest amount of information, I mean the thirteenth century, he gives a lively picture of the different classes of society and of the agrarian system of the country. This study induces him to point out the multifarious survivals of the class of free-born tenants, of whose origin and history he makes a detailed investigation in his following chapters. Among these survivals preserved by cartularies, rentals and inquisitions, I may first mention the so-called 'homines de antiquo dominico.' They appear in Bracton as an exception to the general rule, by which the lord could take away the ground possessed by the peasant, or augment the amount of his payments. These tenants could not indeed sue in the king's court, but in the court which he held, not as king but as lord, they could maintain their rights by the 'parvum breve de recto secundum consuetudinem manerii,' being thus clearly distinguished from other classes of *villani*.

In a like category of freemen are also, 1st, the so-called 'radmen,' 'radulf,' or 'rodchenistri' mentioned in the Black Book of Peterborough, who had no other duties to perform than to lend their ploughs to the manorial lord and attend him with their horses on several specially defined occasions; 2nd, the 'drengs' of the Boldon Book, whose character is very near to that of the radmen; 3rd, the 'hundredarii' or villeins, whose sole obligation was to be present at the meetings of the hundred courts; 4th, the

villeins of the county of Kent, to whom the cartularies of the thirteenth century apply the following rules: 'Dominus non debet aliquem operarium injuste et sine judicio a terra sua ejicere;' 'Dominus non ponet eos ad operam sine consensu eorundem' (Rochester Cartulary); which means that the villeins of Kent possessed exactly the same rights as the 'homines de antiquo dominico,' paid no other rents but those established by custom or agreement, and defended their rights in the soil by suit in the manorial court; 5th, and last, the different kinds of soemen, of whom the Year-books of Edward I speak as of persons 'statu liberi[1],' who could not be removed from the ground or compelled to pay more or other rents than those fixed by agreement or custom, their obligations to the manorial lord being of the same kind as those of the 'libere tenentes' or freemen.

Mr. Vinogradoff is therefore warranted in saying in the conclusion of the first chapter of his book, that inquiry into the social conditions of the different classes of the English peasantry during the thirteenth century leaves no doubt as to the existence in its ranks of a considerable number of free elements, too powerful to be overturned by the might of feudal barons or the legal subtilties of lawyers.

Mr. Vinogradoff next enters into a detailed discussion of the agrarian system of the thirteenth century, with the purpose of discovering the survivals of a more ancient system of landholding than that represented by Mr. Seebohm under the name of the 'virgate' system. He states incidentally that the two-fields system (contrary to the opinion of Nasse and in accordance with that expressed by Thorold Rogers) prevailed in England during the greater part of the thirteenth century, and then gives his opinion as to the chief reason why the lands belonging to the same household were scattered over the whole area of the village intermixed with those of the neighbours. He thinks it is for no other purpose but to equalize the shares of the different households, that an equal access was given to the enjoyment of all the fields composing the village area, these fields widely differing one from the other as to the richness of soil and the advantages of situation. By two or three instances, borrowed from monastic manuscripts, he tries to make the reader understand the way in which this equality in the enjoyment of agricultural commodities was really achieved and the extraordinary subdivision of shares which was the result. In complete disagreement with Mr. Seebohm, Professor Vinogradoff tries to establish that the 'hides,' the 'virgates' and the 'bovates'

[1] Bracton's use of this term is different.

were nothing else but fiscal units, and that the real distribution of the ground in the agrarian community did not correspond on the whole with the description given in the surveys. When these last documents mention the fact of such or such manor containing so many hides or virgates 'de ware' or 'ad invaram,' they intend only to say that the manor has to pay to the Crown so many shares. ('Wara' meaning the same as the German 'Wehre,' the expression 'so many hides or virgates' is to be translated as so many shares that you have to answer for.)

I think that, on this point, Professor Vinogradoff is quite right and that the documents are in accordance with his view. How could we explain otherwise the fact that certain cartularies, and among others the cartulary of Ramsay, sometimes mention the fact that the same manor contains a different number of hides, so many hides answering to the king and so many to the abbot? Take for instance the following text: 'Villata defendit versus regem pro 10 hydis et versus abbatem pro 11 hydis et dimidia' (Ramsay Cartulary, Rolls S. 473). How is it to be understood, unless we agree with Mr. Vinogradoff that the agricultural divisions of a manor did not always correspond with the fiscal divisions, and that therefore the villeins had to pay rent for a greater or smaller number of shares, as the one mentioned in the fiscal survey? (p. 122).

'The virgate system,' judiciously observes the author, 'has been the starting-point for large and very audacious theories.' The fact that parcels constituting one single virgate were scattered over the whole area of a village finds, according to Mr. Seebohm, its explanation in the method of allotting to different households greater or smaller shares in each of the cultivated fields, according to the number of oxen contributed by each to the common work of ploughing. From the time of the Anglo-Saxons, and, to judge by the instances of the Welsh and Irish agricultural arrangements, even in the old British days, the soil of England has been cultivated as a rule by large and heavy ploughs. Each of them was drawn by eight oxen, a number much too large to be owned by every one of the household. The result of it was, that peasant families were obliged to combine their forces to cultivate their ground. This very ingenious theory is directly contradicted, as Mr. Vinogradoff informs us, by the following facts. First of all, nothing like cultivation in common is to be found either in Russia or on the whole European continent. On the other hand, Anglo-Saxon documents mention no other ploughs but those drawn by one pair of oxen, and even in later days the system of large and heavy ploughs appears to be in use only on the 'demesne' land of the manor, the ploughs of the

villeins requiring but the half of that number [1]. Under such circumstances, the theory of Mr. Seebohm can hardly be maintained. But if so, we do not see how the 'gemenglage' of the fields, to employ a well-known German expression, can be explained otherwise than by reference to the necessity of equalizing the economical advantages of each of the households belonging to the same village community.

Mr. Vinogradoff concludes this most interesting account of the agrarian system of mediæval England by a minute picture of the different modes of communal ownership in meadow-lands, and a detailed description of all the agricultural works that the villein had to perform on the demesne lands of the manor, as also of the different rents he paid to the landlord. What gives a special value to this part of the work is the great amount of information that the author has accumulated out of manuscripts belonging to the British Museum, the Record Office, and the Bodleian Library. Having worked through the greater part of the rentals and cartularies accessible to the public, he has been able to find the key of more than one dark question. Specialists will be most interested in the explanation he gives to such terms as 'molmen,' 'chesland,' 'lodland,' 'serland,' 'unlawenerthe,' &c., terms the meaning of which (as far as I know) is still a matter of controversy.

After a general description of the economical and social conditions of the country people, Mr. Vinogradoff enters into details as to the constituent parts of a manor. Mr. Seebohm has tried to establish that the manor contained only two sorts of lands—the land of the villeins or serfs, and the land of the lord, the so-called 'inland.' Part of the last could be given out to free tenants. Hence the 'libere tenentes' mentioned by rentals and inquisitions. The liberation of the serfs from their agricultural obligations conduced incidentally to the same result. At all events, 'libere tenentes' have not, according to Mr. Seebohm, any land of their own in the manorial arrangements of mediæval England; they possess some parcels of ground, but their possessions are inconsiderable as compared with the villein tenements held in virgates. Such is not the opinion of Professor Vinogradoff, according to whom the land of the manor was divided as a rule into three different parts, the part of the lord, the part of the villeins, and the part of the free tenants: these last, instead of owning exclusively small parcels, were in possession of half and entire virgates, sometimes of whole hides, and their holdings were arranged according to the same virgate system

[1] In the lately published Burton Cartulary (Collections for Hist. of Staffordshire, vol. 5) there is repeated mention of 'aratra fortissima in dominio.'—Ed.

which was applied to the tenures of the villeins[1]. Several instances occur in which no villeins are to be found among the inhabitants of the manor, their place being taken by free tenants. Such is the case of the manor of Kenesworth, mentioned by the *Domesday of St. Paul.*

Where free tenants are mentioned side by side with villeins, their rights to use the common pasture ground are regulated by the same rules as those of their servile neighbours. All these facts, according to Mr. Vinogradoff, point to the conclusion that, instead of being an accidental and posterior element in the population of a township, free tenants belong to its earlier constituency.

Although I completely agree with the opinion expressed by Mr. Vinogradoff as to the failure of Mr. Seebohm's theory, I will venture some criticisms concerning the general method followed by the Russian author.

This method has been imposed on him to a certain extent by the way in which Mr. Seebohm has arranged the materials of his ingenious work. Both scholars begin with comparatively recent times, and, having ascertained the existence of certain survivals of a more remote period, ascend to earlier epochs. Every time when a certain institution appears to be archaic, the Russian author is inclined to give it an Anglo-Saxon origin. The English scholar goes one or two steps farther back, and speaks of Roman and Celtic influences.

Both seem to ignore that among other influences one, not so far remote, has to be taken into account. It is the influence of the economical arrangements and legal institutions of Normandy. The fact that terms like 'villani' and 'servi,' 'dimidii villani,' and 'villani plenarii' were used in the Duchy many decades earlier than in the British island, ought of itself to have attracted their attention to the necessity of being very cautious in attributing a specially Saxon, Roman, or Celtic origin to the institutions and customs they deal with. If scholars of such deep knowledge as Mr. Brunner have succeeded in the establishment of this truth, that such a characteristic feature of English institutions as the 'Trial by Jury' has a Norman origin, it is not a matter of pure fancy to ask oneself if the system of agriculture and the social arrangements of the country from which came the overthrow of the Anglo-Saxon kingdom have not exercised a certain influence on the system of landholding and the domestic economy of the centuries closely following the Conquest.

The reader will remember the prominent part which the so-called

[1] Extant maps made in the late sixteenth and early seventeenth century tend to confirm this.—Ed.

'villani de antiquo dominico' play in Mr. Vinogradoff's theory of the antiquity of free-born tenants. Being in full possession of their ground, such villeins had, as we have seen, the right of pleading against a lord who would either dismiss them from their tenures or alter the conditions on which they were admitted to hold their shares. And what alone is peculiar to them, they had only to show the fact that such was their situation at the time of the Conquest to have all their claims recognised by the manorial court. Mr. Vinogradoff finds no objection to the idea that such privileges point to their character of free tenants, if not after, at all events before, the Conquest.

He does not ask himself if the fact of those tenants occupying exclusively ancient demesne lands, recognised as such at the time of the Conquest, is not a direct inducement to search for a Norman origin to their exceptional privileges. Such is nevertheless the case, and when we read in the legal fragments supposed to be the laws of the Conqueror, 'Cil qui cultivent la terre ne deit l'un travailler se de lour droite cense, noun le leist a seignurage de partir les cultivurs de lur terre pur tant cum il pussent le dreit service faire,' and compare this statement with the legal position of the villeins of Normandy, so far as it is known from the 'tres ancienne coutume de Normandie,' we shall certainly perceive that the right to defend their tenures and to maintain without alteration their previous obligations to the landlord recognised by the villeins in ancient demesne lands, has no other than a Norman origin. The old 'coutume' of Normandy plainly says that no landlord has the right to dismiss the villein from his land or to alter the conditions of his tenure. Is it not very likely that at one time Norman potentates had followed towards the English tenants of their demesnes the same course of dealing that was imposed on them by the custom of their native country? On this view, the privileges enjoyed by the villeins of the ancient demesne are not to be cited in favour of the antiquity of free-born tenants.

I should also like to see some English scholar engaged in a minute investigation of the agricultural arrangements of Normandy as they are stated by old cartularies, amongst others that of the Monastery of Holy Trinity at Caen (12th century, Bibl. Nat. fonds lat. N. 5650). The Anglo-Saxon origin of the large ploughs or carucae being necessarily rejected, on account of its complete disaccord with documentary information and ploughs of seven and eight oxen known under the name of carucae occurring in Norman manuscripts of the twelfth century (the cartulary just named amongst others), it is very likely that the Norman origin of the caruca would become an established fact, so much more so as Domesday

itself speaks of the carucata as a Norman land-measure (Domesday, i. 162 a: '50 carucatas sicut fit in Normania').

The third and fourth chapters of Mr. Vinogradoff's book (which constitute but the third part of the whole) treat at length of the social and agricultural condition of the English peasantry under the Norman and Anglo-Saxon kings. Recent investigations of the Domesday Survey have been taken into account, but a great deal of original research has also been directly performed by the author.

Within my present limits I cannot give a detailed account of the last chapters of Mr. Vinogradoff's book. Without giving the author's arguments, I will only mention the leading ideas of this part of his work. Mr. Vinogradoff enters at great length on the question whether the agricultural measures of Domesday, such as the hide, the carucate, and the virgate, represent the real state of things, or are only to be considered as fiscal divisions very like the 'souls' of the Russian census before the abolition of serfdom. Citing a great number of instances where local agricultural arrangements did not correspond to the description given to them by Domesday, the author concludes in favour of the exclusively fiscal character of the terms on which Mr. Seebohm has built all his theory of the village communities under the Norman kings. But if so, no conclusions as to the system of landholding are to be arrived at by studying the methods in which the land was divided by the compilers of Domesday for purposes of taxation. Of much greater importance are the hints which the great census of William the Conqueror contains as to the social divisions of the people. The first conclusion they impose on us is the recognition of the considerable number of freemen scattered all over England, not only in Kent or the Danish provinces, but also in the southern and western counties.

The 'alodiarii' of Kent, Sussex, and Berkshire, the 'drengs' of Lancashire, the 'lagmen' of Lincoln, the 'sokmen' of the Danish provinces, the 'radmen' and the 'vavassores,' are but different names of the same class of freemen. If sokmen are not to be found in the western counties, the reason of it is no other than that the compilers of Domesday employed totally different names, and amongst others the one of villeins, to designate persons of free blood[1]. The considerable number of freemen militates against the idea of an exclusively servile village community. The scanty information contained in Domesday as to common pastures and meadows under the run-rig system, applies as well to servile as to

[1] In the French text of the laws of William the Conqueror, 'sokmen' is rendered by the French word 'villein.'

free communes. But if free peasants are still to be discovered (even under the Norman kings), there may be no doubt that the process of feudalisation which had already begun in the ninth and tenth centuries was highly strengthened by the Conquest, and that 'commendations,' very frequent during the eleventh and twelfth centuries, rapidly limited the number of free tenants. This is the conclusion to which we arrive by a careful study not only of Domesday book, but also of the local surveys of the thirteenth century, the Black Book of Peterborough and the Boldon Book.

The chapter on the Anglo-Saxon period contains a very able discussion of the social condition of the ceorls, whom Mr. Vinogradoff considers to be freemen of very small estates. The reasons of their personal subjection to the proprietors of large estates and of the process of feudalisation of their lands are considered at length.

The general impression obtained by reading the pages in which the subject is treated is that Anglo-Saxon England underwent the same process of interior development which was familiar to Continental Europe, and that Palgrave was right when he spoke of feudalism as being established long before the Conquest.

As to the system of landholding, Mr. Vinogradoff is of opinion that it can be reduced to two distinct forms only, the folcland and bocland. He has no difficulty in proving that the latter being of a more recent origin, the oldest method of landholding among the Saxons of England was the folcland. Although Mr. Vinogradoff agrees in this point with Kemble, the explanation he gives of the character of the folcland is, as far as I know, an original one. He considers it to be, like the gentile land, subject to alienation only with the consent of the blood relationship. It is out of this gentile ownership that the free village community is supposed to have developed itself. Now, this seems to me the weak point of Mr. Vinogradoff's excellent book. First of all, the definition the author gives to the folcland is contradicted by the well-known fact that the king disposed of it with the advice of the Witenagemot. It does not agree with the precise statement of Beda, contained in his letter to Egbert (a 734), that the kings disposed of the folcland as a sort of remuneration for military service. On the other hand, the reduction of all the species of landed property to the folcland and bocland leaves out of account the existence of such facts as the inheritance of certain lands from 'propinqui,' their alienation 'cum recto consilio propinquorum,' and the power of devising them 'post se suae propinquitatis homini cui ipse voluerit.' It is only by the confusion of the so-called 'yerf-land' or hereditas with the folcland that Mr. Vinogradoff has

been able to come to the extraordinary conclusion that all the land of England was previously folcland. We must wait for better information before we depart from the theory of Maurer about the four different modes of land-ownership in Saxon England, especially with the limitations and distinctions given to it by Mr. Frederick Pollock. In this scheme the folcland is but the 'ager publicus,' not to be confounded with common lands; the 'yerfland' is the 'terra a viatica' of the lex Ripuariorum, the bocland is the 'acquisitum' of continental Germans.

I do not think fit to conclude this paper by any general eulogy of the learned work of Mr. Vinogradoff. The account I have given will, I hope, leave no doubt as to the necessity of making it accessible as soon as possible to English readers and English critics.

MAXIME KOVALEVSKY.

EARLY ENGLISH LAND TENURES.

II. Domesday Studies[1].

IN an age of centenaries it was probably inevitable that the eight-hundredth anniversary of the completion of the Domesday Survey should be taken as the opportunity for a public celebration, and it is now safe to congratulate the Royal Historical Society on the success which attended their experiment in 1886, and upon those literary results of their undertaking of which the first instalment has now been edited by their learned Secretary. Although William the Conqueror has now been formally enrolled among English statesmen, so far at least as that distinction can be conferred by the historical biographer, there might still have been a fatal touch of the ludicrous about any proposal to mark with popular applause the recurrence of the date of the dreadful fight at Senlac, or the completion with fire and sword of the dismal story of the Conquest. The disappearance of the Norman element from our society, and the death of feudalism and servitude, may make us indifferent to the sufferings of our English ancestors, and ready even to acknowledge that the fate which overtook them was in reality a blessing in disguise; but there is, nevertheless, something distasteful in the idea of rejoicing, even after eight centuries, in the details of the national downfall and the wholesale degradation of the English gentry and peasantry. Why then, it may be asked, should we have gone out of our way to celebrate the making of 'the great Rate-book,' designed as it must have been to consolidate the results of the Conquest, the book of which our old chronicler complained, that so very narrowly the king caused it to be traced out that there was not a hide or yard of land, 'nor even (it is shame to tell, though it seemed to him no shame to do) an ox or cow or swine was left that was not set down in his writ'? We can only answer that such remarks would appear to be just, if the Survey were only viewed as a monument of the actual Conquest, but that the whole course of the proceedings at the late Commemoration, and even perhaps the abstinence of the learned societies of Normandy and Scandinavia from taking any prominent part therein, show that this 'incomparable record,' to use Mr. Hallam's phrase, was studied and regarded throughout from an English point of

[1] Domesday Studies. Being the papers read at the meetings of the Domesday Commemoration, 1886. Edited by P. E. Dove. Longmans. 1888. Vol. I.

view; it was in fact treated as standing quite apart from the tale of Norman exactions, and as being a help towards elucidating the phases of our social history and illustrating the growth of the English Law.

A scholarly essay by Mr. Stuart Moore on the study of Domesday Book serves as a general introduction to the subjects with which this volume is concerned. He brings out very clearly the Conqueror's design in causing the Survey to be framed, and the invaluable help which the returns must have afforded in every department of the State. He justly regards the record 'as a great Rate-book, and not as a Survey of Extent.' The land-tax, on which the defence of the realm depended, was very irregularly collected 'upon an old and uncorrected assessment.' It fell heavily on the poorer tenants, while the Church and the nobility had obtained unfair and even enormous exemptions. The measures of land on which the tax was imposed varied according to local custom in every part of the country, while large tracts, especially in the West of England, had never been measured for purposes of taxation at all. The king determined to ascertain with respect to every estate in the country the old assessment and annual value, the value at the date of the enquiry, and the best means of framing a new assessment on the actual rateable value. He seems to have adopted the method best suited for a purely agricultural country, cultivated, (as England was then,) on a common-field system, with a two-course or three-course rotation of crops according to the usage of the district and the capability of the soil. The Commissioners were directed to ascertain by local enquiry the number of plough-teams which could profitably be employed on each estate and the number actually employed, with other particulars showing the value of the estate in the reign of King Edward, at the date of the Conqueror's grant, and at the date of the Survey being made. Among these particulars were included mills and fisheries, meadows, woods and pastures, and the live stock found on the demesnes; but this last item was omitted when the full return was made up, except in the counties of Norfolk, Suffolk, and Essex. The valuation was based in all cases on the sworn testimony of the tenants and of the neighbours assembled in the Hundred Court. We must agree with Mr. Moore that the proposal for assessment by the number of plough-teams was a fair and equal tax on the productive powers of the estate. Putting aside special items of profits, such as mills and underwoods, which were added to the valuation as they occurred, the taxation of the team would reach the value of the pasture on which the cattle were fed, the houses of the tenants, and all the remainder of the actual profits. We may refer for an

account of the incidental advantages of the Survey to the words in which Sir T. Duffus Hardy described what he held to be 'the greatest and most perfect experiment ever made by our own or any other people in economic legislation.' In a well-known passage of his work on the Materials for the History of Great Britain he speaks of Domesday as a register of the land and its holders, its extent, transfer and resources, its produce, 'its deprived and present possessors, the stock of the manors, the number of the tenants, cotters, slaves, and cattle employed upon them.' He points out how at the same time it was 'a military register, showing the national capabilities of defence, the position of the defenders and their relation to the Crown, a census of the population, a survey of their means of subsistence, their employments, and condition, a topographical and genealogical dictionary of all the great families in England, and a faultless record of real property, its incidences and distribution.' At first of course its value for fiscal purposes was paramount. By its aid the king might know how 'to live of his own,' and could tell what manors owed rent and lodging for the Court, what renders might be claimed from the sheriffs and farmers of the county-dues, what lands were held in chief and liable to the most onerous of the feudal incidents, and what value might be expected from a purchase or an escheat of baronies and manors in the hands of a subject. A passage quoted by Mr. Moore from the Register of Waltham Abbey shows how the national record might be useful from the subject's point of view. 'It can be seen by it,' says the monkish commentator, 'how the manors of this church were held before the Conquest and in the Conquest: it can also be seen how many hides there are in every manor, and if the king should wish to tallage his realm by hides, it can be seen at how many hides our manors are taxed, notwithstanding that by charter this church is free from hidage; it can also be seen what estates the tenants of our manors have of right; I do not say what estate they have at present, because by the patience and negligence of lords and bailiffs by long continuance they have now a freer estate, and may have other than they should have, to the disherison of the church and the peril of the souls of those who in such cases ought to have provided a speedy remedy.' As time went on the record became useful in other ways. The tenants in ancient demesne applied to it for proof of their privilege as servants of the Crown, and the serfs and labourers on many a private estate sought in vain among its entries for something to give legal validity to their ancient customs and traditions. When it was enacted that a prohibition should not lie for a demand of tithes for a new mill, Domesday Book became useful evidence of what mills were

ancient or not, and when the Fourth Lateran Council freed from tithe the demesne-lands of the four privileged Orders, a new value was found for the record in ascertaining the limits of the monastic exemption. It has been treated as the ultimate authority on many doubtful points of tenure, even in times when the judges could only certify that certain words were found in the book of which they could not pretend to understand the meaning. Its uses survive to the present day, though its practical value is somewhat impaired by the changes of name undergone by manors and hundreds in the long lapse of time since its completion. Mr. Moore points out that the Survey is frequently used to show the antiquity of particular manors or the relative position of superior and subordinate manors and in dealing with questions relating to mines and rights of common, and he adds that the record has been found and is likely to be found extremely useful in cases concerning fisheries. Add to all this that the great Survey is in the view of the law the unfailing authority for all points of historical importance relating to the Norman Conquest, and we shall be able to sympathise to a great extent, if not precisely to agree, with the enthusiastic judge who averred in the Case of Tanistry that '*notre record de Domesday est de melieur credit que toutes les forein discourses ou chronicles du monde.*'

Of the contemporary documents enough information remains to enable us to form a general idea of the methods pursued by the Domesday Commissioners; though the difficulties of the subject, arising from varieties in practice and difference of local circumstances, must always prevent us from gaining more than an approximate knowledge of the details. Several of these documents are discussed or fully referred to in the volume now before us, and a bibliography of the whole will be found in the popular account of Domesday Book by Mr. W. De Gray Birch, which has recently been published under the direction of the Society for promoting Christian Knowledge. The most important of these records are the Exeter Book and the 'Inquisitio Eliensis,' or survey of the lands of the monastery of Ely, both printed by Sir H. Ellis in the appendix to the folio edition of Domesday, and the 'Inquisitio Comitatus Cantabrigiensis,' which is bound up in the same volume of the Cottonian MSS. as the better-known Ely Inquest. This Cambridge survey is supposed to represent 'the original source from which the Exchequer Domesday of Cambridgeshire was compiled,' being a transcript at least as early as the reign of Henry II. of the returns made by the sworn surveyors throughout the county in obedience to the writ on which the Commission was founded. It was first published in 1876 by Mr. N. Hamilton of the British Museum; but Mr. Round

shows us in his essay on 'Danegeld and the Finance of Domesday' that its importance was recognised and great use made of its contents in a paper on the Danegeld by Mr. Carteret Webb, read before the Society of Antiquaries about the middle of the last century. The Ely Inquest is also important as containing not only a fuller account of the monastic estates than appears in the Exchequer record, but as being prefaced by a heading which purports to give the exact form of the articles of enquiry, so that we are able to arrive at a just idea of what the heads of the returns for other parts of the country must have been, making allowance for local differences in the forms of tenure and the division of various districts for purposes of assessment. The Exeter Book, which was exhibited at the late Commemoration, is so called because it now forms part of the collection of manuscripts at Exeter Cathedral. It has been made the subject of exhaustive commentary by Sir Henry Ellis, and was copiously used by Mr. Eyton in his learned essays on the interpretation of Domesday Book. Following Mr. Birch's interesting summary of its contents, we find that the main body of the manuscript consists of a survey of the five south-western counties, described in the same order as in the official record. 'It is supposed to contain, so far as it extends, an exact transcript of the original returns made by the Commissioners at the time of preparing the general survey, from which the Exchequer Domesday itself was afterwards digested and compiled;' and it is worth remarking that the accounts of the cattle and stock on the demesnes and other minute details follow the same forms as the Inquests for Cambridgeshire and the lands of Ely as well as of the surveys of Norfolk, Suffolk, and Essex, in the second volume of Domesday. This general account of the five counties is followed by three documents of the highest importance. These are three copies of the 'Inquisitio Geldi,' or taxation of the hundreds for the Danegeld imposed in the year 1084. The second of these copies is nearly the same as the first, with some marginal or interlinear additions; the third seems to be a corrected edition of the other two. The connection between the imposition of the Danegeld and the finance of Domesday is traced by Mr. Round with great learning and ingenuity. He adopts a distinction, first drawn by Mr. Carteret Webb, between the tributary Danegeld, which was used for buying off the Danish invaders, and the stipendiary Danegeld, which had its origin in 1012 when a Danish fleet entered into the English king's service and began to receive regular pay. This special tax appears to have been abolished in 1052, but was reimposed in 1084 and collected on the old lines of assessment. It seems probable that the inconvenience experienced in collecting the tax according to

the old method was the immediate occasion for making a new national survey. The Exeter Book also contains a number of summarised descriptions of the estates of various Abbeys and baronial tenants in the counties with which the record is concerned.

These documents relating to the Danegeld show that the assessment was measured by the number of hides in each hundred, subject to various exemptions. In the year 1084 the demesnes of the barons, as well as the lands of the king's husbandmen, were treated as free from liability; but Mr. Round adduces good reason for thinking that this was an exceptional incident, and that there is ground for believing that the barons had agreed to the imposition of an abnormally heavy tax on their inferior tenants in consideration of their own demesnes being exempted from payment. Notwithstanding all Mr. Eyton's efforts to produce a key to Domesday and to show the exactitude of its methods of mensuration, we cannot say exactly what average the hide represented. The hide does not seem to have been intended for a measure of superficial area; it rather stands for the lot or portion of land which usually went with a homestead, and its extent may have varied almost indefinitely according to the nature of the soil, the custom of the neighbourhood, or the terms of the original grant. When the hundreds were rated at so many hides apiece, it is natural to suppose that some standard of value would be adopted which would tend to uniformity of assessment, and we shall probably be safe in assuming that for the purposes of the Exchequer the hide and the customary ploughland of the district were treated as identical quantities. That some such process took place appears from the entries in Domesday Book as to certain lands never having been divided by the hide, or as to there being more hides in fact than were covered by the old assessment, or as to a ploughland or so many ploughlands remaining over which had not been included in the hides. In later times the name of the hide was certainly given to the ploughland of the southern counties. This ploughland is found in many instances to have contained 120 acres of arable: it must be remembered, however, that there was no rule confining it to any certain extent, and that it in fact represented the amount of land fixed by the custom of the district as the proper quantity for one team to plough in a year, with an indefinite addition of wood and pasture according to the needs of the tenant and the resources of the manor or township. Fleta tells us that in the time of Edward the First the ploughland in a common field contained 180 acres of arable if the field was cultivated on the three-course system, but 160 acres if it was worked on a two-course shift. This would seem to be a just calculation if we allow for a double ploughing of the fallow in each case, because the teams

would have the same amount of labour, though there would be a little less produce from the two-course field, which we may suppose to have been of a harder nature and a less productive quality.

The hide was the unit of assessment in the southern counties, with the exception of Norfolk and Suffolk, and of Kent, where the account was taken by the Suling, which may be described as a customary ploughland varying in size between 160 and 210 of the Kentish acres, measured by the sixteen-foot perch. In the northern counties (disregarding Northumberland and Durham and parts of Cumberland and Lancashire, as not having been comprised in the Domesday Survey) the districts called hundreds in the south were represented by wapentakes, themselves in some parts subdivided into smaller hundreds; the hide was replaced for purposes of taxation by a measure known as the carucate (divided into eight oxgangs or bovates), which in this connection must be regarded as a customary measure of Danish or Anglian origin, having no fixed relation to the ploughland, or land sufficient for one plough, by which the Domesday Commissioners estimated the productiveness of each estate. This part of the subject is very clearly explained by Mr. Round in his 'Notes on Domesday Measures of Land,' which may be considered as being in many respects the most instructive of the essays in the volume before us.

Canon Isaac Taylor has collected a quantity of valuable evidence, based for the most part on actual maps and surveys, in order to show the connection of the entries in Domesday with the common-field system of husbandry. In the essay on the Ploughland and the Plough, he deals with the ancient unit of assessment in different parts of Yorkshire, where the number of taxable ploughlands is either the exact double or the exact equivalent of the number of ploughlands actually tilled or ready for tillage. He supposes that this variation indicates the existence in the several localities of townships cultivated on the three-course and two-course systems; and he suggests that the taxable unit may have been the land under tillage in each field, and not the area of the ploughland distributed in three or two fields as the custom of husbandry might require. The suggestion provides an ingenious answer to a problem of acknowledged obscurity; but there is great difficulty in supposing that any regular system of taxation could involve a double payment for a method of farming which produced little more profit than that which escaped with a single plough-tax. In any case the anomaly which he endeavours to explain is confined to a particular district, and it will probably be found that the theory will not solve the difficulties which have arisen as to the assessment of

other parts of the country. Canon Taylor deals in another essay with the origin of the Wapentake, which he believes to be the union of three Hundreds for the purposes of naval defence, just as the Hundred had always been treated as 'the unit for the military defence of the kingdom.' So far, however, as an opinion can be formed on such a difficult point, it would seem more probable that the divisions in question arose under different constitutional systems, and that Dr. Stubbs is right in affirming of the Wapentake, that 'no attempt can be made to account for its origin on the principle of symmetrical division.'

Mr. O. C. Pell's researches into the ancient measurements of land are already well known through the paper read by him in 1885 before the Cambridge Antiquarian Association. His learned essay in the volume before us deals with the same subject over an enlarged field of investigation, in which he will find few who have the knowledge or endurance to follow him. His treatise deals in reality with the whole theory and practice of measurements, and is only incidentally connected with the study of Domesday Book, although he has endeavoured to give a new view of the 'unit of assessment,' and to correlate the Hide with a 'pound-paying unit of land,' subdivided according to the various tribal and national divisions of the pound of silver. The most useful parts of his work for our present purpose are those in which he compares the entries in the Domesday Book with those which afterwards appear upon the Hundred Rolls in relation to the same estates.

Mr. Round criticises with some severity Mr. Seebohm's statement that 'the hide was used in the Survey exclusively as the ancient unit of assessment, while the actual extent of the manor was described in carucates.' But the statement seems in reality to be a true account of the matter, expressed in somewhat too general terms. What the Commissioners appear to have actually done was first to identify the estates in a particular Hundred, ascertaining which lands represented the Hides, (or the 'sulings' or 'carucates' in particular districts,) and then to determine the existing condition and value of the property, and to estimate from the evidence at their disposal the chances of improvement or deterioration. They had for this purpose to find out how many teams were in use, taking the demesnes and the tenancies as far as possible under separate heads, and to state how many teams in their opinion the arable area could properly sustain. Whether their estimates for the future were generally correct we have now little means of ascertaining, but it is certain from modern experience that many parts of the country were as badly cultivated in the reign of George the Third as they had been in the days of

Edward the Confessor. The survey of Minster in Thanet shows that '48 sulings' were liable to tax (the demesnes in the lord's hands being treated as exempt), and that there was arable sufficient in the Commissioners' view for 66 ploughs. Now in a deed of composition, made in the nineteenth year of Henry the Sixth between the Abbot of St. Augustine and his tenants, it appeared that the more ancient of the two measurements had remained in use with a very slight variation. This deed stated the customary extent of the 'suling' in Thanet to be 210 Kentish acres, and fixed the rent of $4\frac{3}{8}$ sulings of 'corn-gavel land,' and of $42\frac{1}{4}$ sulings and 38 acres of 'penny-gavel land,' representing between them the amount of arable cultivated at the Domesday Survey, without any increase in the number of ploughs. Instances of this kind could be produced from many parts of the country to show either that the Commissioners were estimating the different estates by a new Norman measure, or that they were making a calculation of a possible enlargement of the area of cultivation which never took effect in practice.

Canon Taylor calls attention, in an essay which will be widely read and highly appreciated, to the numerous survivals of the ancient system of agriculture which may still be observed in many lately-inclosed districts. 'Even where the land has long been inclosed and divided into separate holdings it is instructive to ride across the country, and observe how indelibly impressed on the soil by the ancient plough are the marks of those very divisions of the land which are recorded in the Domesday Survey.' He points out that the direction of the country lanes is often determined by the extent of the Domesday tillage; he observes 'queer rights of way' running at right angles to the roads along the mounds which once, as 'headlands,' served to give access to the strips intermixed in the open fields; and he traces 'the curvature of the hedges,' which constantly follow the divisions of the oxgangs, and mostly correspond with the balks which once 'separated the ploughed strips of different owners.' The acre-strips, which had been originally straight, were, as he shows, bent in the course of centuries 'by the twist of the great eight-ox plough as the leading oxen were pulled round in preparation for the turn,' when they approached the end of the 'furlong' by which the longer side of the acre was usually measured. 'When the land is nearly level the rigs are S-shaped, with a curve at each end, but when the land is on a slope the rigs are often J-shaped with a curve at the bottom of the hill; if the hill was steep the plough went horizontally round it, forming those curious terraces on the hill-sides which are called "lincs" or "reeans".' The reader will recollect the picturesque account of

these terraces in Mr. Seebohm's interesting book. Here we may conclude our general view of the first volume of essays. Mr. Hyde Clarke in his preface to the volume gives a full account of the Domesday Commemoration and a statement of the Committee's plans with regard to the preparation of this part of their work. He has added an instructive paper on the Turkish Survey of Hungary as compared with the system employed in the preparation of Domesday Book. This paper should be read in connection with Canon Taylor's more elaborate Essay on 'Survivals,' from which several of the foregoing extracts have been selected.

CHARLES ELTON.

THE BEATITUDE OF SEISIN. II.

BY a previous paper I have tried to draw attention to a great and very remarkable change which came over our law in the course of the later middle ages. Does the law protect possession against property? If we ask this question in Bracton's day, the answer must be: Yes, it protects possession, untitled and even vicious possession; if *O*, the owner, has been ousted by *P*, he must reeject *P* at once or not at all; should he do so after a brief delay, then *P* will bring the Novel Disseisin against him and will be put back into possession. But if we ask this question in the days of Littleton, the answer must be: No, the common law does not protect possession against ownership, except in those comparatively rare cases in which there has been a descent cast or a discontinuance, one of those acts in the law (their number is very small) which have the effect of tolling an entry. In the present paper I propose to collect some cases which illustrate this change, and then to say a little about its causes.

The fourteenth century produced no great text-writer, and we have therefore to rely upon the Year Books. It may be well therefore to observe that the Year Books are for this or any similar purpose very unsatisfactory material because they are chiefly concerned with points of pleading, and by the middle of the fourteenth century pleadings had become very unreal things. Often the whole object of the defendant's pleader is delay, and the elaborate story that he tells has in all probability but little connexion with fact; he is just trying to puzzle the court and his adversary, and so no wonder if he puzzles us. A good selection from the Plea Rolls would be much better material; because at least occasionally we should find in it some real facts, some cases in which the assize was taken, in which special verdicts were returned and judgments given upon those verdicts. Even in the fourteenth, even in the fifteenth century, some real justice was done, but as it is we can hardly see the justice for the chicane.

It will be remembered that the Novel Disseisin lies if *B* unjustly and without a judgment has disseised *A* of his free tenement. The plaintiff therefore must have been 'seisitus de libero tenemento.' What does this imply? This is the question which successive generations have to answer. We have heard Bracton's answer, and Britton's. The latter requires that the plaintiff shall have had 'title de fraunc tenement,' but peaceable seisin for a long time after

a vicious entry is enough to give 'title de fraunc tenement[1],' that is to say the disseisor himself may acquire a possession protected against the disseisee. In the following notes of cases we may, I think, see this requirement of 'title' growing ever more and more stringent: the assize is gradually denied to any one who has himself been party to a disseisin, then to the alienee of a disseisor, then to the alienee of the alienee of a disseisor, until at last the cases in which the true owner is debarred from entering are quite few and very anomalous. All the while the theory, so far as there is one, remains this, that one who is 'in by title' (as contrasted with one who is 'in by tort') ought not to be ejected without process of law; but as to what 'title' is, we get no clear statement.

1292. (Y. B. 20 & 21 Edw. I, p. 221.) *M* is tenant for years, *A* tenant in fee; *M* enfeoffs *X*; *A* suffers *X* to remain in possession for a quarter of a year and then turns him out, the term not having yet expired; *X* brings the assize against *A* and succeeds. Otherwise would it have been if *A* had ejected *X* at once; as it is, *A* has suffered *X* to continue his seisin 'e entant granta le franc tenement estre le seu.'

1292. (Y. B. 20 & 21 Edw. I, p. 267.) *M* is tenant for years, *A* tenant in fee; *M* dies during the term; his wife *N* remains in possession for a quarter of a year, and then enfeoffs *X*, who remains in possession for a quarter of a year and is then ejected by *A*; *X* recovers seisin against *A* in an assize. It is said of *A* that 'par sa suffraunce demeyne si acrut franc tenement a le feffe.' Counsel for *A* says that if a termor alien in fee, yet even if the feoffee continue his estate for half a year, he may be ejected by the reversioner after the end of the term; 'quod non credo verum generaliter,' says the reporter.

1302. (Y. B. 30 & 31 Edw. I, p. 123.) Land is settled on husband and wife and the heirs of their bodies; they have a son *A*; the husband dies; the wife marries *X*; the wife dies; *X* claims curtesy and remains in possession for ten years; *A* ousts *X*; *X* recovers seisin against *A* in an assize. Even if *X* was not entitled to curtesy, still he entered claiming a freehold and ought not to have been ejected after ten years. The case is a good illustration of possessory procedure, for *A* at once brings a formedon against *X*. In this he fails; but only because the conditional gift was made before the Statute *De donis*, and so *X* really was entitled to curtesy.

1318. (Y. B. 11 Edw. II, f. 333–4.) It is said by counsel that if tenant for life alienates, and the reversioner does not assert his right for three or four years, the feoffee will be able to recover his seisin against him in an assize.

[1] Brit., vol. i. p. 310.

1327. (1 Ass. f. 2, pl. 13, and Y. B. 1 Edw. III, f. 17, 22, Trin. pl. 1, 10.) Land is recovered from *A* the true owner by one *X* whom *A* had ejected; such title as *X* had was derived (without any descent cast) from a grant made by *M* who had no title, but whom *A* had suffered to occupy the land; *A* had stood by while the land had been dealt with by *M* and persons claiming under *M*. Counsel urges that it is 'inconvenient' to award seisin to one who has no estate; but the judgment shows the true possessory spirit, 'quod licet *A* jus habeat ut videtur .... tamen de facto suo proprio sine judicio intrare non potuit; ideo *X* recuperet seisinam suam.' Brooke (Abrid. *Entre Congeable*, 48) notices that this case, and that last cited, imply a doctrine which in his day was no longer law. He rightly remarks that in cases of this date stress is laid on the fact that the person who has come to the land by a feoffment, will, in case he be ejected without action, lose the benefit of vouching his feoffor to warranty.

1334. (8 Ass. f. 17, pl. 25.) On the death of tenant for life, *M* who has no right enters and enfeoffs *X*; *A* who is the reversioner enters and is ousted by *X*; *A* recovers from *X* in an assize. The reporter calls on us to note that *X* was in by feoffment, but that *A* entered immediately on the livery of seisin.

1344. (17 Ass. f. 53, pl. 27; Y. B. 18 Edw. III, f. 35, Mich. pl. 16.) *M* is tenant for life, *A* has the remainder by fine; *M* enfeoffs *X* in fee; *M* dies; *A* may not enter on *X*.

1347. (21 Ass. f. 86, p. 23.) It was said that a man may enter on the feoffee of his disseisor even though the feoffee has continued his estate for ten years. 'Tamen quaere,' says the reporter.

1348. (22 Ass. f. 93, pl. 37.) *M* doweress, *A* heir; *M* demises to *X* for years and dies within the term; *X* holds on after the term; *A* may enter on *X*; but it is argued that he may not: the decision is based upon the fact that *X* was 'party to the tort.' Counsel for *X* says that after the death of *M* 'nous continuamus nostre possession ans et jours:' of which phrase notice must be taken hereafter.

1368. (Y. B. 42 Edw. III, f. 12, Pasch. pl. 18.) It seems assumed that a disseisee may enter on the alienee of a disseisor and on the alienee's alienee, but may not enter on the disseisor's heir; the question is raised, Why should this be so, as both heir and alienee are in by title?—but no answer is found.

1369. (43 Ass. f. 273, pl. 24.) Tenant in tail after possibility of issue extinct makes a feoffment in fee and dies; the reversioner may enter on the feoffee even after the lapse of six years; but the justices of assize had doubted this and adjourned the case to Westminster.

1369. (43 Ass. f. 280, pl. 45.) *A* tenant for life, *B* tenant in

remainder; *A* enfeoffs *X* in tail, remainder to *Y*; *X* dies without issue, *Y* enters; may *B* enter on *Y*? Yes, he may; but the case is discussed at length and the decision is put upon the ground that *Y* by entering has made himself a party to the forfeiture and a disseisor, and it still seems the opinion of the justices that one may not enter upon a person who is 'in by title.' Brooke (Abrid. *Entre Congeable*, 85) comments on this case thus, 'In those days one could not enter on him who was in by title, except in a special case (such as this was) where he was party to the tort, and one could not enter on one who was seised for a long time (que fuit seisie ans et jours), as appears frequently in the Book of Assizes. But otherwise in these days, for a man may enter on the twentieth alienee if there has been no descent to toll the entry, or something of the sort.'

1376. (Y. B. 50 Edw. III, f. 21, Mich. pl. 3.) *M* tenant for life; *A* reversioner; *M* enfeoffs *X* for life with remainder to *Y* in fee; *M* dies; *X* dies and *Y* enters; *A* or *A*'s heir may enter on *Y*. This is decided after much debate. It is however asserted by counsel that a reversioner can not enter on the feoffee of the feoffee of the tenant for life; at all events if he is to enter he must do so at once.

It seems unnecessary to trace this matter further, and we have come to the gap in our authorities due to the fact that no Year Books of Richard II's reign are yet in print. Before the death of his grandfather the common law seems to be taking its final form; possession is not protected against ownership except in certain very exceptional circumstances. We shall here do well to observe that Coke, like Brooke before him, well knew that there had been a change in the law. 'In ancient times,' he says, 'if the disseisor had been in long possession, the disseisee could not have entered upon him. Likewise the disseisee could not have entered upon the feoffee of the disseisor, if he had continued a yeare and a day in quiet possession. But the law is changed in both these cases, only the dying seised, being an act in law, doth hold at this day[1].' In the margin Coke refers to Bracton, Britton and Fleta, and to some of those cases in the Year Books which have already come before us.

Now as regards the owner's right to enter, we seem fully entitled to say that Coke had good warrant for his opinion that there had been a great change in the law, a change in favour of the owner; he had gained a right to enter in many cases in which it would formerly have been denied to him. But for the more precise rule that a disseisor's feoffee must not be disturbed after year and day, I have not been able to find any definite authority. I think that Coke may have taken it from a statement in Brooke's Abridge-

[1] Co. Lit. 237.

ment which has been mentioned above. The phrase however which Brooke uses is not 'an et jour,' but 'ans et jours,' and this I believe means vaguely 'a considerable time.' Coke's rule was not the rule of Bracton's day, for this was yet more favourable to possession. Still even in Bracton's time a year's possession was required of an intruder before he could claim protection against the remainderman, and it seems to me very possible that the gradual dissolution of the old law was checked for a moment at the point when protection was still given to a disseisor's feoffee if he had been in possession for year and day. There are certain reasons, which I hope to give on another occasion, for thinking that this may have been the case.

But now how are we to understand this episode in our legal history, this gradual victory of the rights of ownership over the rights given by possession? If, with Mr. Justice Holmes, we regard it as a mark of 'good sense' that a defendant in a possessory action should be allowed to rely on his title, then we may regard this as a gradual victory of good sense. But let us first note that after all the victory was but partial. It was the nineteenth century before a defendant became able to rely upon title, if by title be meant a right to *possess* the land. The only 'title' that even the fully developed common law enabled him to assert was a right to *enter upon* the land[1]. In 1833 it was still possible that the person entitled to be in possession of land should have no right to enter upon it 'sine judicio;' if he entered and ousted the possessor, he would, I take it, have had no defence to an action of ejectment or to an assize[2]. That in actual practice this happened very seldom was not due to the good sense of the common law, but to statutes which had helped the common law out of the bad mess into which it had got in Littleton's day. A statute of 1540 confined the doctrine of descents which toll entries within very narrow limits[3]. Another statute of the same year prevented a husband from effecting a 'discontinuance' of his wife's lands[4]. The dissolution of the monasteries and legislation as to other ecclesiastical corporations, left tenant in tail the one person who could 'discontinue the possession,' and this power of his became unimportant because generally he could do much more than 'discontinue the possession,' he could utterly bar his issue, remaindermen and reversioners[5].

[1] 3 & 4 Will. IV, c. 27, s. 39.
[2] *Smith* v. *Tyndal*, 2 Salk, 685.
[3] 32 Hen. VIII, c. 33.
[4] 32 Hen. VIII, c. 28, s. 6.
[5] Mr. M. M. Bigelow has kindly informed me that the old rule about descents tolling entries, as modified by the statute of 32 Hen. VIII, prevailed in Massachusetts until 1836, in Vermont until 1839, in New York until 1849. I know of no book in which the outlines of the ancient law of real property are so well stated as Stearns, *Real Actions*, a course of lectures delivered in the University of Harvard about seventy years ago. The learning of real actions was much better preserved in America than here, because

Now by way of explanation of what happened between Bracton's time and Littleton's, it might be suggested that in the course of civilization wrongful ejectments became much rarer, and that therefore it was needless, and if needless then unjust, to maintain the old possessory action in all its pristine rigour. But it may well be doubted whether during the period of which we speak wrongful ejectments became rarer. The fifteenth century was at least as lawless as the thirteenth. This was the time of forcible entries and private wars, of maintenance and champerty. 'In 1399,' says Dr. Stubbs, 'the commons petitioned against illegal usurpations of private property; the Paston Letters furnish abundant proof that this evil had not been put down at the accession of Henry VII[1].' 'Forcible entry and disseisin with violence,' says Mr. Plummer, 'were every-day occurrences, and were almost restored to the position of legal processes which they had held before the invention of the grand assize[2].' Not a little of the blame for this state of things should rest upon the judges who, by allowing the utmost license to mendacious pleadings, had made the assize of novel disseisin anything but the festinum remedium which it still was in the days of Edward I. That assize must have been very badly handled; otherwise the Statutes of Forcible Entry would never have been necessary. In 1381, 1391, 1402, 1429, statutes were made which ransack the whole armoury of the law for weapons against disseisors, indictments, summary convictions, imprisonment, ransom, actions of trespass, special assizes, restitution, treble damages, treble costs. Even under the strong rule of Henry VIII it was necessary to furbish up these weapons. So late as 1623 there is a new statute for the protection of possessors who are not freeholders[3]. It may I think be gathered from these statutes and the decisions upon them, that the true remedy for a crying evil was found in making forcible entry a crime. The judges refused a civil remedy under the statute of 1429 to a possessor forcibly ejected by an owner whose right of entry had not been tolled; although such a possessor could have obtained restitution in criminal proceedings[4]. Whether the makers of the statute meant this may perhaps be doubted; but at any rate the decision shows how far the judges had departed from Bracton's position; they could not conceive that a possessor with no title or

some at least of the States had the good sense to reject our action of ejectment with its intricate fictions, and to renovate the old direct remedies.

[1] Stubbs, Const. Hist. vol. iii. p. 270.

[2] Fortescue on the Governance of England, Introduction, p. 21. Mr. Plummer, I imagine, intends to refer rather to the assize of novel disseisin than to the grand assize.

[3] 5 Ric. II, stat. 1. c. 7; 15 Ric. II. c. 2; 4 Hen. IV. c. 8; 8 Hen. VI. c. 9; 23 Hen. VIII. c. 14; 31 Eliz. c. 11; 21 Jac. I. c. 15.

[4] Y. B. 9 Hen. VI. f. 19 (Pasch. pl. 12) decided the year after the statute was passed. Bro. Abr. *Forcible Entrie*, pl. 27.

bad title could be 'disseised' by a person who had good title, and whose right to enter had not been tolled by descent cast or discontinuance. 'Disseisin' in such a context had come to imply something more than dispossession of a possessor, something more than dispossession of a possessor who has colour of title; it had come almost to mean dispossession of one who has relatively good title by one who has relatively bad title.

It may be that for a long time past the judges had felt that there was some want of 'good sense' in allowing *A* to recover possession from *B*, when *B* was willing to prove that he had a right to be in possession; some want of good sense because this would be putting *A* into possession merely in order that a question might be raised in some future action, which might very well be decided once for all in the present. But then the judges of Bracton's day saw no want of good sense in this, so we have to account for the change of mind. What is more, we may never safely refer great changes in the common law directly and immediately to opinions as to what is politic or expedient, least of all changes which took place in the period of the Year Books. Judges and counsel talk little of public policy; 'Fiat justitia, ruat coelum,' is their maxim; the social fabric may fall in with a crash, but their legal logic must have its way. Thoughts of the common weal must be expressed in forensic terms, 'seisin' and 'freehold' and so forth, before they can influence decisions. To a full explanation of the process indicated by those notes of cases which I have given above we shall hardly at present attain; but a little may be done towards clearing the way for other investigators.

In the first place something may be learned from the history of the law touching the time within which an assize must be brought. It seems that from the first the Norman writ of novel disseisin, which probably we ought to regard as the parent, or perhaps elder sister, of our own, could only be brought by one who had been disseised since last August. Each harvest set a term of limitation running; if a man was disseised at harvest time he had a full year within which to complain; if he was disseised shortly before harvest, then he had but a much shorter time. Year and day seems regarded as the normal term of limitation, but it is assumed that harvest time is the great time for disseisins. This gives to the Norman law a curiously homely character[1]. In England no such annual limitation was established. Glanvill tells us that the period within which an assize can be brought is fixed from time to time by royal ordinance. The writ that he gives mentions the king's last journey into Normandy, an event that

[1] Heusler, p. 373; Brunner, p. 329.

must have been quite recent[1]. Such ordinances were issued after Glanvill's day; we find Richard's first and second coronations, John's coronation, John's return from Ireland, Henry's coronation, Henry's journey to Gascony, are chosen as limits behind which a plaintiff may not go. When this last event was chosen it was but seven years old or thereabouts[2]. The Statute of Westminster I, while it altered the time for other writs, left this unaltered: so in 1275 it seems to have been considered that a disseisin committed five and forty years ago was yet 'novel.' This means a great change, but is little to what follows; for no other time was limited until the reign of Henry VIII, so that in 1540 a disseisin three hundred years old was still 'novel[3].' Now this should be had in mind, for though in theory it may well be possible that an action shall be thoroughly and truly possessory, and yet be subject to no rule that limits a time within which it may be brought, still it would be difficult to maintain the theory in practice. If I be permitted to demand restitution of land on the ground that you ejected me eighty or even twenty years ago, whatever we may call this complaint, it will be difficult to think of it as other than a demand that you should restore to me what is mine, difficult to think of it as based not on proprietary right but on injured possession, and difficult because substantially unjust to prevent your pleading whatever title you may have.

We ought to look below this curious history to its cause, which is not to be found altogether in the remissness of parliament. In 1275 parliament in a splendid outburst of youthful vigour was beginning to overhaul the whole law of the land; and yet a term of more than forty years was not thought too long for the assize of novel disseisin. Ten years later the secret is revealed. 'Forasmuch,' says the Statute of Westminster II, 'as there is no writ in the Chancery whereby plaintiffs can have so speedy a remedy as by a writ of novel disseisin.' Here is a summary remedy for the recovery of land, why not extend its beneficent operation? Why insist that the defendant shall have obtained possession so very recently, or by what is technically called a disseisin? If we have come by a good form of action, why not use it? This seems the view of the matter taken by the parliaments of Edward I. A sensible, practical view it may be; but legal principle avenges itself. If we try to make our possessorium do the work of a petitorium, it will soon refuse to do its own proper work; questions of title will be raised in it and will be decided.

[1] Glanv. lib. 13, cap. 32.
[2] Stat. Merton, cap. 8; Ann Burton, p. 252; Bracton, f. 179.
[3] Stat. 32 Hen. VIII. c. 2.

Thus the most elementary notions of the law are blurred. Take for instance the classification of actions as real and personal, or real, personal and mixed. This in all probability was not native in our law and was never thoroughly at home there. Bracton introduces it. He holds indeed that an action for goods cannot be *in rem*, because the defendant has the option of paying the value of the goods instead of surrendering them; but he knows too much of Roman law to call an action 'real' merely because the successful plaintiff will thereby obtain possession of a specific thing. The Novel Disseisin, for example, is *actio personalis;* it may be *rei persecutoria*, but it is *personalis* [1]. So the cognate writ of intrusion is *omnino personalis* [2]. So the *Quod permittat* is *potius personalis quam realis* [3]. With him the test is rather the nature of the mesne, than the nature of the final, process. If the mesne process is against the thing, if e.g. the land is seized into the king's hand, the action is real, but if, as in the assize of novel disseisin, the process is attachment, then the action is personal. The active party in such litigation is not a demandant, he is a plaintiff, he is not *petens*, but *quaerens*. This last distinction perdured to the end; it is a mistake to speak of a 'demandant' in an assize. But after a while an action becomes 'real' merely because land is obtained thereby, and it is 'mixed' if damages also can be obtained [4]. Indeed even an action on a covenant may be a real action [5]. Had Bracton been a pupil of Savigny he could not have stated more clearly than he has done, that the Novel Disseisin is a personal action founded on tort [6]. The mere change in terminology, a retrogressive change as it may seem to some, may be explained by the fact that our law became always more insular, our judges always more ignorant of any law but their own; but that the Novel Disseisin fell into the general mass of real actions requires some further explanation.

This we may find if we turn to another famous distinction, that between possessory and proprietary actions. Between the proprietary writ of right and the possessory assizes there grows up a large group of actions, the writs of entry. Of their history I hope to write a little on another occasion. Here it must be enough to say that in Bracton's view they are, with some exceptions, distinctly proprietary actions. In course of time however they come to be called possessory. This one fact by itself is enough to warn us that the distinction becomes exceedingly obscure. Now these actions became quite as easy as the assize;

[1] f. 164 b. [2] f. 161. [3] f. 284 b.

[4] Lit. s. 492 and Coke's comment.

[5] The writ of covenant real, whereon fines were usually levied, was abolished in 1833 along with other 'real and mixed actions.' See Bl. Com., vol. iii. p. 157.

[6] Bract. f. 103 b, 104, 164 b.

indeed it would seem that they became even easier, for a particular form of writ of entry (the writ of entry in the nature of an assize, or writ in the quibus) came to be commonly used in the fifteenth century instead of the Novel Disseisin. As regards simplicity and dispatch, the equalising process seems to have been rather one whereby the possessorium was deteriorated than one whereby the petitorium was improved. So far as mere 'process' is concerned the Novel Disseisin must down to the very end, down to 1833, have been a fairly rapid action, quite as rapid I should think as the action of ejectment. Why it went out of use is no very easy question; but apparently the subtleties of pleaders 'feigned, dilatory and curious pleadings' worked its ruin[1]. The formulation in the original writ of the question for the jurors, was a device only suitable to an age whose law was as yet but meagre. As such terms as 'freehold' and 'disseisin' become more and more technical, the pleader of one litigant becomes more and more anxious that the question so formulated shall not be answered, and the justices take that pleader's side, for they hold that matter of law is for the Court and only the purest fact for laymen. The pleadings in assizes become at least as complicated and 'colourable' as the pleadings in other actions, perhaps more complicated and 'colourable,' because there is a fixed question for the jurors which has to be evaded. And so the assizes fall into the ruck of 'real actions.' Now it is not inconceivable that a possessory action should be strictly possessory, although it is not distinguished from proprietary actions by a specially summary procedure. But that this should be so must imply a legal theory of possession and of the reasons for protecting it, fully developed and precisely defined. Such a theory our lawyers of the fourteenth century had not got, and the momentous contrasts in procedure were things of the past. It was easy in Henry II's time to distinguish the rapid possessory procedure in the king's court from that proprietary procedure in the feudal courts wherein the tenant after manifold essoins could always wage battle if he pleased. In Edward II's time, when normally all questions of fact (and no other questions) were tried by a jury, when there was as much pleading in an assize as in any other action, when there were writs of entry which some thought possessory and others proprietary, when there was hardly any 'real' action in which damages could not be recovered, no wonder that the theory of the Novel Disseisin was not maintained, no wonder that it refused any longer to protect possession against ownership, or only did so in a spasmodic, capricious, half-hearted way.

Coming a little nearer to our problem, we see that the process

[1] See Coke's Preface to 8 Rep.

which gradually extends the sphere of self-help allowed to the ousted owner begins by permitting him to enter, regardless of lapse of time, upon the person who has himself been guilty of a disseisin. Bracton, we have seen, had apparently inherited a set of ancient positive rules determining the time for reejectment; normally it must be accomplished within four days, but a longer time is allowed to an owner who is absent when the disseisin is committed. But he rationalizes these rules by speaking of patience, negligence and acquiescence. In this there is no harm, even on a very strict theory of possessory remedies, provided acquiescence in the mere physical fact of adverse possession be carefully distinguished from any such acquiescence as will serve to confer or extinguish proprietary rights. But even Bracton himself does not bring this out very clearly; a *longa et pacifica seisina* protects the possessor against the owner's self-help; a *longa et pacifica seisina* bars the owner from his action and acts as a *usucapio*[1]. The old positive rules being rationalized away, such language becomes very dangerous. The problem then becomes this, What length of seisin will serve to confer a 'title de fraunc tenement,' 'an estate of freehold.' There is no answer ready; it is a matter for judicial discretion; the judges lean towards the owner; there is no longer a striking contrast between possessory and proprietary procedure to direct their thoughts; they no longer feel, what Bracton felt, that for an owner to take the law into his own hands, to make himself judge in his own cause, is a usurpation of judicial functions, a contempt of court; they no longer feel the force of the phrase, 'injuste quia sine judicio.' The notion of acquiescence is an insecure foot-hold, and gradually it slips away. No distinction can be found between the acquiescence which bars entry, and the acquiescence, or rather lapse of time, which bars action. So on the disseisor himself the owner may always enter.

But cannot firm ground be found in the protection of titled possession? Let the owner enter on one who is 'in by tort,' but not on one who is 'in by title.' It seems that our law was arrested at this spot for a while. But really the ground is not firm. To protect possession as such even against ownership, may be wise; and to protect possession acquired by title and in good faith, may also be wise; but to require title and yet ask nothing as to good faith can hardly serve any useful purpose. Suppose that *A* has been disseised by *B*; we refuse to protect *B* against *A*'s self-help. Then *B* enfeoffs *C*; shall we protect *C* against *A*, and this without inquiring whether *C* took the feoffment in good faith? To do so is absurd; for if we do it every disseisor will

[1] See especially f. 52.

have a *C* ready to hand. Had a requirement of good faith been introduced, then indeed a halting-place might have been found. But this could not be done; a psychological investigation was beyond the means, beyond the ideas, of our law. 'The thought of man shall not be tried, for the devil himself knoweth not the thought of man.'

Then again reference must be made to a statute. The Novel Disseisin was so convenient a remedy that its scope was enlarged. The statute of Westminster II, as already said, informs us that 'there is no writ in the chancery whereby plaintiffs can have so speedy a remedy as by a writ of novel disseisin.' Therefore this writ is to be extended to cases in which as yet it has not lain. If a tenant for years or a guardian aliens in fee, both feoffor and feoffee are to be adjudged disseisors[1]. It seems probable both from the words of the statute and from Bracton's text that before this act the feoffee was no disseisor, though I know that according to later opinion—at least according to the opinion of some later lawyers—this statute was made 'in affirmance of the common law.' But this only means that in course of time the same rule was applied to cases not within the very words of the clause: the feoffee of a tenant at will, or by sufferance, or by elegit, or statute merchant was held to be a disseisor[2]. Such a feoffee therefore was not 'in by title.' This must have opened up the question, What then is title? since the mere fact that a person had come to the land by feoffment was inconclusive. For this question there was no easy answer, and we soon find that one who takes a feoffment even from a tenant for life, (a person who is seised,) is regarded as 'party to the tort.' It seems to me that the rule which treated a feoffment in fee made by a tenant for life as a forfeiture was not yet well settled in Bracton's day, and that as the law of forfeiture grew stricter the position of feoffees grew worse and worse. Then, as may be seen in some of the cases noted at the beginning of this paper, the question arises as to the feoffee of a feoffee. But no logical rest can be found; twenty feoffments may be made in one day, and the last feoffee will be just as guilty as the first. So as a general rule the feoffee has no more protection than the feoffor has; he is unprotected against the owner. The 'discontinuances' remain outstanding as exceptional cases. No forfeiture is involved in them; if a husband alienates his wife's land, this of course cannot be a forfeiture; husband and wife are too much one for that: if an abbot alienates the abbey lands, there is no one who can have any right to take the land from the feoffee so long as that abbot is abbot; as to the tenant in tail, it would have been very difficult to

[1] Stat. West. II. c. 25.

[2] 2 Inst. 412; compared with ibid. 154.

hold that by alienating he forfeited his estate to his own issue. So in these few quite exceptional cases the feoffee comes in without there being any disseisin or any forfeiture; here then the old rule still prevails, he has a seisin of freehold in which the law protects him even against the true owner.

The doctrine of descents cast is another relic. Blackstone seeks to account for the law's protection of the disseisor's heir by some ingenious arguments:—(1) the heir comes to the land 'by act of law, and not by his own act;' (2) 'the heir may not suddenly know the true state of his title;' (3) this rule was 'admirably adapted to the military spirit of the feodal tenures, and tended to make the feudatory bold in war; since his children could not by any mere entry of another be dispossessed of the lands whereof he died seised.' Such reasoning as this seems to me conspicuously absent in the Year Books. If Blackstone's object was to explain the history of the rule and not to find some excuse for retaining it in the eighteenth century, then he asked the wrong question; instead of inquiring 'Why is the disseisor's heir protected?' he should have inquired, 'Why is not the disseisor's feoffee protected; why is not the disseisor himself protected?' It seems to me that English law having once given up the attempt to protect mere possession against ownership, stumbled forward towards the 'good sense' (if such it be) of never giving any civil remedy against a person, who being entitled to possession, takes possession. But it knew not well whither it was going. For a long time, for a century and upwards, it had before it a vague idea that though mere possession is not to be protected against the owner, still innocent possession deserves protection. The disseisor's feoffee loses protection because in very many cases he is party to a forfeiture and a tort. On the other hand the heir enters innocently; death and descent cast are not wrongful acts; there is no fraud in entering upon that of which one's ancestor dies seised. The law demands innocence; but innocence it judges by rude external standards. To our minds of course the possessor, who of all others is best entitled to favour, is not the heir but 'the bonâ-fide purchaser for value' who has honestly but unfortunately bought a bad title. But an inquiry into good faith, a respect for valuable consideration, these do not belong to the law of the fourteenth century, and if we suppose ourselves unable to try the thought of man, then we shall think that the heir's position is stronger than that of the feoffee. Very probably the latter has been guilty of some tort, very possibly he is but a man of straw behind whom the disseisor himself is lurking; but the heir is presumably innocent, and undoubtedly he comes to the land by 'title.' If however we read Littleton's chapter on 'Descents which toll

Entries,' we shall hardly fail to observe that the protection which is still given when a descent has been cast is given very grudgingly; every sort of excuse seems accepted for allowing 'him that right hath' to enter upon what is his own. The rule which protects the heir looks as if it were being pared to the quick. It has become an isolated anomaly; that it did not disappear altogether may be in great measure due to Littleton's genius; a man of his ability had it in his power to stereotype the law at an evil moment. Then, as already said, Parliament came to the rescue and the tolling of an entry became an anomaly, and in actual practice a rare anomaly; but it was not until 1833 that the long experiment, the experiment of Henry Fitz Empress, was brought to a formal and final end. Practically for the last three hundred years and more, theoretically as well as practically for the last fifty years and more, we have had no action in which an ejected possessor could recover possession from the owner who ejected him: certainly this is a fact which deserves the consideration of all who are troubled with theories of possession [1].

F. W. MAITLAND.

[1] Since this article was in print, Mr. H. W. Elphinstone has suggested that the curious rule of Norman law which makes the last harvest a term of limitation is very intelligible if a system of common fields and common agriculture was prevalent: it is only at harvest time that an owner does any act which manifests an exclusive ownership.

RAILWAY MORTGAGES AND RECEIVER'S DEBTS IN THE UNITED STATES.

IN his preface to a work which is destined to be of high authority in the United States, and of interest to all investors in American railway securities, the author says, 'The law of Receivers is largely the growth of the last five-and-twenty years, and is moreover essentially American in its character and characteristics[1].' Had this remark been made concerning the chapter on Receiver's Certificates only, it would have been even less subject to exception than it is, for without doubt it is chiefly in the courts of that country, both State and Federal, that the once narrow rule which permitted limited expenditures for the care of the estate by a mortgagee in possession, or by a court, acting at the instance of a creditor, has been so expanded, that at the present time the holders of bonds of railway companies situated in those jurisdictions there, where the common-law title of a mortgagee and his right to possession after default have been superseded by the more modern notions, according to which he has merely an equitable lien upon the property in the nature of a chattel interest, are frequently obliged to incur an expenditure pending a foreclosure and sale wholly out of proportion to the benefits which have accrued to them from their investment.

In Mr. Beach's work he has written upon this subject with necessary conciseness, and it is proposed here to consider with more detail those cases in which property in the hands of a Receiver of a railway appointed at the instance of a bondholder, can be charged with the payment of claims of third persons, and to what extent the power of a Court of Equity can be exercised in this regard.

Generally speaking, all expenses which must be necessarily incurred for the conservation of the property will be charged upon it. Among them are fees of the receiver and his counsel, amounts laid out for repairs, or for betterments, when these are necessary; when the property consists in part of a business, payments for rentals, salaries of assistants, tools, office expenses—all these will be allowed, provided the Receiver has obtained sufficient general or specific authority from the court for the outlay. Such expenses impose an equitable lien upon the estate which, being incurred in

[1] Commentaries on the Law of Receivers. By Charles Fisk Beach, jr. New York: 1887.

preserving the property, will in certain cases be enforced as paramount to all others.

The theory upon which this rule is based is stated by Lord Justice Turner[1] to be that the Court represents the whole estate, and stands in the position of a trustee of it, and the person placed in charge is the paid agent of the Court to manage the estate in its hands. The moneys due him are moneys due to the Court itself, and when the Court has in its hands moneys belonging to the estate, on account of which it has made payments, it must have the right to repay itself its advances out of these moneys. This right, he says, has priority over the costs of suit even, for as to a fund in the hands of a trustee his expenses must be the first charge.

The most frequent illustration of this practice is that afforded by the American cases of railway administration through a receiver, and the incidental charge upon the property for the payment of receiver's debts, usually evidenced by certificates. A receiver's certificate is a promise to pay, out of the proceeds of the estate, and usually contains a covenant that the charge upon the estate is a first lien, paramount to all others, together with a reference to the decree which has authorised the issue and created the preference. Such certificates are not evidence of a debt of the railway corporation, but of the receiver solely, and the Court is pledged to devote the property in its possession or the proceeds, when it is disposed of, to their payment. This results from the fact that they are but a device for appropriating in advance a portion of the property, in order to enable the Court to save the remainder from waste.

The cases in which these preferential liens have been created are, *first*, those in which the claims of the creditors at large against the owner of the estate all stood upon an equal footing, there being no contract for security in favour of any creditor over another; and, *second*, cases where some contractual obligation, in the nature of a lien upon the property sought to be charged, was created before the debts arose for which the certificates were issued. These contractual obligations, the parties to which were the railway company, upon the one hand, and, upon the other, third parties, who often were wholly unconnected with the litigation, have usually taken the form of mortgages or trust deeds conveying both the railway property and its earnings to secure the payment of bonds issued by the company, and it is in reliance upon the lien created by the mortgage, which may at the time be paramount to all others, that the bonds are purchased.

It may again be observed that the debts evidenced by a receiver's certificate are, like those spoken of by Lord Justice Turner, debts of

[1] *Morrison* v. *Morrison*, 7 De G. M. & G. 226.

the receiver in his official capacity—that is to say, as an officer of the Court, and consequently are the obligations of the Court itself. In liquidating past due debts, or in creating new ones, by the issue of certificates, the Court can only act by virtue of the powers of conservation and administration to which reference has already been made. In the former of the two cases mentioned, where no contractual obligation will be dishonoured in their exercise, these powers are limited only by the exigencies of the situation. In the second case, the circumstance that the creation of a new lien in favour of a certificate holder, commits the Court to the disaffirmance of a prior obligation, leads to the inquiry, Whence is such power derived, and what, if any, are its limits? Although this subject, of the implied breach of contract by the aid of the Court, may not at first appear to be involved in a discussion of the administration of the estate, yet such a result may follow directly upon the principle adopted for the distribution of the proceeds as between the first lien holders and the new class of creditors.

We may notice further, as a preliminary question, the difference between those debts which find their first and only recognition in the final decree, when the estate is distributed, and those which are evidenced by the certificates. The former may include the expenses of the suit, together with disputed claims against the property, which are established by the decree itself. In the latter are included debts existing against the estate at the time the receiver took possession, the payment of which he has been directed by the Court to assume, because otherwise he might be hampered in carrying on his duties (as an illustration of which may be mentioned past due balances upon traffic agreements with other companies which are continued in force by the receiver), and debts incurred by him which the current earnings have not been sufficient to discharge. Obligations incurred for the purchase of supplies, such as new rails, are an illustration of these. The essential distinction between these two classes of debts is worthy of notice in another view. In the former case no action of the Court initiated by itself has increased the charges upon the estate; in the latter, the Court becoming a borrower of money has carried on its administration upon credit, with the result that having been compelled to rely upon individuals for the conduct of details, it has too often found that its delegation of power did not result beneficially to the parties concerned: to the bondholders, because the money borrowed or forborne must be first paid out of the proceeds of the sale; and to the corporation, because the benefits to its estate from the borrowing are by no means to be measured by the debt incurred, part of which may have been used for current expenses; and though part may

have been laid out in permanent improvements, yet at a forced sale the difficulty of realizing the amount so invested is manifest. Thus the principal of the debt has accumulated, however slightly the actual value of the property may have been enhanced.

The habit into which courts have fallen of imposing these forced loans upon the property of railroad companies is without doubt the product of an unbusinesslike system of corporate management, of which so many examples are found in America, where speculative methods upon the one hand are joined to a limited earning capacity upon the other, due to competition or to lack of patronage; and where extravagance in the creation of a bonded debt has entailed a burden far in excess of the income of the company. The inevitable result of this is a default in the payment of interest, but not until every available asset has been appropriated in a vain attempt to postpone it: so that when a court is called upon to intervene it happens in nine cases out of ten that no capital is found in the company's treasury with which to meet current engagements or to carry on the enterprise.

Under these circumstances two alternatives are presented for adoption[1]. One is the old method usually applied to banking, insurance, and manufacturing companies, of shutting down and stopping by injunction all operations and proceedings, taking possession of the property in the condition it is found at the instant of stoppage, and selling it for what it will bring at auction. The other is to give the receiver power to continue the ordinary operations of the corporation, to run trains of cars, to keep the tracks, bridges, and other property in repair, so as to save them from destruction, and as soon as the interest of all persons having any title to or claim upon the corpus of the estate will allow, to dispose of it to the best advantage for all, having due regard to the rights of those who have priority of claim.

Notwithstanding that an eminent judge of the Sixth Circuit has declared in an Ohio case, 'That it is not a part of the duty of a court to run a railroad[2],' yet doubtless no Court of Equity would consider that its duty either to the company or its creditors or to the public permitted a resort to the former alternative. Yet it is often a question whether that course, if followed, would not have been the wiser one. If in the famous case of the reorganisation of the West Shore Railroad Company the receivers had not continued to operate the road, the bondholders and other creditors would have been saved from an additional liability, for a deficiency in earnings over actual running expenses of a million dollars or more in a single year, which was met by the issue of certificates. But as a choice of the

[1] *Barton* v. *Barbour*, 104 U.S. 136. [2] Judge Baxter.

lesser evil (says Mr. Justice Woods[1]), if not of the most positive good, and generally of the latter also, it has come to be settled law that a Court of Equity may, and in most cases ought, to authorise its receiver of railway property to keep it in repair and to manage and use it in the ordinary way until it can be sold to the best advantage of all interested. The power of a court to do this was expressly recognised in *Wallace* v. *Loomis*[2].

The reasons which have induced the adoption of this policy as the better one, will serve also to indicate with some clearness the extent of the powers possessed by the court to furnish means for carrying it forward.

As we have already noticed that the power of the court to use a portion of the estate or fund in its charge, whether railway property or otherwise, in order to preserve the remainder, is an inherent power, the question to be immediately considered is, whether in the case of a railro d its preservation cannot be better accomplished by keeping the property in use, and whether it is not rather the duty of the court to do so, even at some expense.

The general rule has been guardedly stated by the Supreme Court of Virginia as follows:—

'A Court of Equity, having in charge the mortgaged property of a railroad company, is authorised to do all acts that may be necessary within its corporate power, to preserve the property and to give it additional value, not only for the benefit of the lien creditors, but also for the benefit of the company whose possession the court has displaced by the appointment of a receiver, and by taking into its own hands the property, rights, works, and franchises of the company. Any act, it would seem, necessary for the protection and preservation of the property, is a legitimate and proper act, and whatever is manifestly appropriate to such preservation and protection, or to the enhancement of the value of the property, not in excess of the powers of the corporation, will always be upheld and enforced[3].'

As we shall see further on, cases have arisen in which the powers exerted by the courts have been far greater than those possessed by the corporation whose property was seized. Within the limits stated above, however, the reason most apparent for keeping the property in operation is an economical one. The best and cheapest mode of conserving a railroad may be by maintaining it in repair for use and running the trains. Its earnings depend of course upon its capacity for traffic and upon its good will and the regular patronage that it receives. Any interruption in its business, however temporary, where there were competing lines,

[1] *Barton* v. *Barbour*. [2] 97 U.S. 146. [3] *Gibert* v. *Railway Co.*, 33 Grattan, 586.

might be followed by a serious diversion of freight and passengers, the consequences of which would be a great and permanent depreciation in the value of the property. Experience also shows that it is far better for property of this kind to be constantly used, watched, and repaired, when necessary, even at an expense somewhat in excess of the earnings, than for it to remain wholly idle.

In addition to this, the character of a railway company as a public institution; as the holder of a valuable franchise often exclusive in extent; as the recipient from the public of rights of way and other easements and privileges, which would become valueless except for such use; as a party to a contract that imposes upon it reciprocal obligations to carry out the purpose of its creation by affording facilities for transportation; as an agent of public convenience and public necessity,—such incidents as these compel a court which has arbitrarily deprived it of the right to manage its property to see to it that, while the corporation is thus powerless, its express or implied obligations towards the community are still recognised as binding, and its franchises are in no wise impaired by non-user. As Judge Brewer well says [1], this thought, that a railroad company owes a duty to the public, always underlies the rule by which receivers and courts are to be governed. And although this duty is not enforceable under all circumstances, yet it is one to be enforced by courts themselves whenever they take possession of railroads through their officers.

The acts necessarily implied in such conservation and management, and which are proper for the court to perform, are not unlimited. The observation made above, that powers may be exerted by the courts which are far greater than those possessed by the corporation, was not intended to refer to the policy that might be pursued in such management, nor to the details of its execution. Indeed, there are certain things which it would be perfectly lawful for the company to do, but which for a court would be quite out of place. These will be touched upon when the subject of augmentation of the property is considered. The larger powers assumed by the court concern what, to put the matter in its popular aspect, is said to be a substantial dishonour of the obligations of a contract existing between the company and other parties.

By taking charge of the property the receiver necessarily incurs debts. It matters not whether there is a mortgage lien upon the property, a certain class of those debts must be paid first. Much of the popular complaint which is so frequently heard, of the hardships sustained by bondholders in being compelled to share with others the security and lien which they supposed was theirs alone, is due

[1] *Central Trust Co.* v. *Wabash R. R. Co.*, 23 Federal Rep. 865.

to an entire misconception of the limitations of the mortgage grant, and of the conditions upon which it is invariably made.

There are more liabilities than one to which the property of a railroad corporation is exposed, and which cannot be avoided by any contract whatever with third parties. These liabilities are created by the municipal law, and everything done by the corporation is done subject to them. Of them may be mentioned the paramount lien of taxes, and also the liability of forfeiture to which a franchise is often subject, in case the conditions under which it is held by the company are not fulfilled. Such liabilities are always existent, and they are not greater in degree than has always been the liability of an estate in the hands of a court to pay for its own keeping. And it is certain that in a proper case such a liability as either of these would be duly enforced, were its enforcement demanded.

With regard to mortgagees, a portion of their security is their lien, and a portion is the right to enforce it. The one is of no less importance than the other. A mortgage lien without any remedy for a breach of covenant would be as valueless as a remedy without any cause of action to be enforced. The claim and remedy together constitute the security. As the lien can only exist subject to certain statutory liabilities of which our example is the liability for taxes, so in an equal degree the enforcement of the remedy must proceed according to fixed rules. A bondholder becomes such with a full understanding that, in case of a default, certain obstacles may appear to confront him, and that until these are overcome he must himself wait. Viewed in this light, the postponement of the claims of mortgagees to those of the holders of certificates, who, it must be remembered, are merely those persons whose financial aid the court has been compelled to seek, is but incidental to the court's exercise of its functions. The existence of such a debt is a hardship which is inseparable from this exercise, and the right of a court to act in such manner that debts may be incurred, is measured solely by the extent of its chancery powers to seize and to manage the property of litigants. Instead of there resulting an impairment of the obligation of a contract, which, as some of the State Courts declare, always follows when receiver's debts are given a preference, a court does no more than to put in motion its own machinery as prayed for by the creditor, and the rest follows as a necessary consequence.

It is not to be said that a court is never wrong in ordering the issue of certificates. But the wrongful manner in which its power may be exercised is no indication that power itself is always lacking, and the error will be found to consist either in an improper use of the funds derived or to be derived from their sale, or in the

fact that the particular circumstances presented did not warrant their issue at all.

What would amount to a wholly unwarrantable assumption of power are such acts as are not necessary for the preservation of the estate, and which, being performed, may involve it in expense, and incidentally may render necessary the issue of certificates. The distinction between those acts which are *ultra vires* and those which are not, may be imperfectly expressed by the terms that indicate the results which flow from them. The purpose of the latter has been shown to be conservation; the result of the former is augmentation; and if it shall appear that augmentation is the only thing accomplished, and that conservation has been wholly secondary to it, the error is at once apparent.

By 'augmentation' are meant additions to the estate which are not essential to its safe custody, nor required for its preservation in the strict sense of the phrase. The dividing line between the two is not very distinct, but the term may be said to include any acts by the performance of which the court engages in carrying forward either plans originally contemplated by the corporation, or other schemes or projects of public or private utility however attractive they may be, as a necessary result of which the property is charged with the payment of money. The validity of such acts is not sustained by any of the reasons which we have discussed, for the court cannot assume a power which the corporation lacked, and which must itself be founded only upon, and the exercise of which must be permitted only by, the peculiar relations that spring up when a receivership is initiated.

'The objections to such transactions are that they are necessarily, to some extent, speculative; that they arbitrarily unsettle interests founded upon the most solemn contracts; and that the court in conducting them abdicates its judicial function and exercises another more akin to that of an executive bureau. If therefore the action of a Chancellor goes to the extent of taking the property of the corporation into his hands for the purpose, through his appointees, of completing an unfinished work, or of enlarging or improving a finished one, beyond what is necessary for its preservation, and to that end of raising money by charging the railroad and its appurtenances with liens which are to supersede older ones, without the consent of the holders of these, he has passed beyond the boundaries of a Chancellor's jurisdiction[1].'

There are, however, two exceptions to this principle: one, where the parties in interest expressly consent that the court shall go beyond this usual and stricter rule of practice, and the other, where

[1] *Myers* v. *Johnson*, 53 Ala. 237.

some of the property is in such imminent danger of loss, or where the consequences of making permanent additions will certainly prove so beneficial to the estate, that the court is justified in such a departure.

The first exception is illustrated by many cases, where all parties have concurred in the view that the new work was necessary, and have stipulated upon the record that the disbursements should have priority. It is also illustrated in a measure by those cases where such assent is given by the mortgagees only, and the exercise of the power then invoked seems to imply that the owner of the property had no voice in the matter whatever. But the reasons why bondholders should be consulted appear to apply equally well to the corporation, for as the mortgagor, its interest is presumably as great as that of the mortgagee, and as owner of the fee, it is certainly entitled to say what shall be done with its property, and whether it desires to embark in or to continue to carry on a possibly hazardous enterprise at its own cost. But whatever rights it may have to enter such a protest, the fact of its insolvency seems to invite a total disregard of them. There, however, may be a theory upon which such action might be sustained, though, as it must be confessed, it is not supported by any precedent (nor indeed is it opposed by any).

Whenever a party in interest whose lien is superior to that of all others, agrees that the liens of certificates shall be paramount to his own, and that the proceeds shall be used for extraordinary purposes, for which, failing such consent, they could not be used, that party should be held to have agreed to share the security of his own lien with the certificate holders. Doubtless a case seldom or never has arisen where there has been a surplus at a foreclosure sale of a railroad. The practice is general of permitting the payment of the amount bid to be made in the defaulted bonds, the whole amount issued thus becoming, in the hands of a Purchasing Committee, a single fund, and making competition impossible; and the outcome is that the property is sold at a minimum price.

Were it otherwise, however, a serious question might arise between the bondholders and other (junior) claimants to the fund (or if there were no other claimants, then the corporation), concerning the bondholders' right to receive payment in full, without deducting from their own claims the amount of the certificates, of which the issue was authorised by them, and by them only, and the proceeds of which were used for other purposes than to preserve the property.

Should such a liability be established (and it does not seem unreasonable that those persons who have most assuredly profited by

the increased value, should in proportion to the benefits to be obtained share in the expense which they have caused to be incurred), then the limit of judicial power will clearly appear, and the result will follow that the corporation and its stockholders will be freed from responsibility for railroad financiering from the bench, and only those parties in interest will be liable, who may desire to take that risk in order to enhance their own security, and from whose consent the court has alone derived its powers. And for the same reason the company would be acting quite within its strict rights should it insist that, in case a judgment over for deficiency were applied for, or an action for a personal judgment on the bonds commenced, relief should be granted to it from any increased liability for such exceptional expenditure.

The second exception finds a noteworthy illustration in the case of *Kennedy* v. *The St. Paul & Pacific R. R. Co.*[1]

In this case the court (Dillon J.) authorised the issue of certificates to raise funds for the construction of an unfinished portion of the road, making them a prior lien upon the property. Its most noticeable feature is, that it was not only a case of augmentation, but augmentation in spite of the opposition of the trustees acting for the bondholders, whose wishes were disregarded at the suggestion of a minority. The circumstances seemed to justify the court in taking such a departure, for upon the construction of the road depended a valuable land grant, which was the principal security conveyed by the mortgage, and which without such construction would have presently lapsed. There are so few precedents of this kind that it is only possible to point out that the exception exists without attempting to show its extent.

The foregoing observations may be summarised as follows:—

First. It is the duty of a court in a proper case to take possession of property in litigation for the benefit of all parties interested.

Second. While in its possession the court must preserve it from deterioration.

Third. The expenses incurred in doing this must fall upon the fund, and consequently should be borne by the claimants to it.

Fourth. It is not within the power of the court to incur expenses, chargeable upon the estate, for any acts of management which are not strictly acts of conservation; but

Fifth. Assent by parties in interest may confer such power.

Sixth. It is reasonable that the share of the estate coming to the parties giving such assent should bear the expense.

Seventh. Such extraordinary power may sometimes be assumed without such assent, when great danger to the fund is to be avoided.

[1] 2 Dillon, 448.

and when conservation, though not the direct result, may thus indirectly be accomplished.

In conclusion, reference may be made to still another instance of the exercise of the power to create preferences among creditors, which is not founded upon the idea of conservation. Not unfrequently an order is made permitting the receiver to pay debts incurred by the corporation for work done or supplies furnished within a short time prior to the commencement of the suit, usually ninety days, but often longer. The reason for this may sometimes be that it is necessary to satisfy the claims of labourers and employees in order to retain their services, but when the payment is for supplies furnished or labour already fully performed, the liability for which is included in the unsecured floating debt of the corporation, it cannot be regarded as promoting the interests of any one, save particular creditors, and then only at the expense of others. These payments, when made, always come out of the earnings, and the creditors whose superior claims are postponed are, in cases of mortgage foreclosure, the holders of the bonds, when these are secured by a pledge of the earnings. Though such a measure is novel in the history of equity jurisprudence and is coercive in its nature, it may be justified upon the ground that until bondholders proceed to enforce their remedy against the debtor's property, and during the time that it remains in possession, the corporation should pay such debts out of the earnings[1]. Upon this principle the reasoning of Mr. Chief Justice Waite in *Fosdick* v. *Schall*[2] was founded. He says:—

'We have no doubt that when a Court of Chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labour, supplies, equipment, or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable. Railroad mortgages and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character and affect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested.

[1] *Bridge Co.* v. *Heidelbach*, 94 U. S. 798.

[2] 99 U. S. 255.

This results almost as a matter of necessity from the peculiar circumstances which surround such litigation.

'The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and when companies become pecuniarily embarrassed, it frequently happens that debts for labour, supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt. The income out of which the mortgage is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipments, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do.'

The propriety of exercising this power thus appears to depend upon the evidence showing that the earnings have been improperly applied, and doubtless where the default had been of so long continuance as to preclude the idea of a diversion of earnings for the bondholders' benefit, such a preference would not be declared without the express consent of all parties in interest.

ALBERT GALLUP.

ON LICENSING OF NUISANCES.

THE considerations set forth in the following paper have been in great part suggested by observation of the tram system tolerated in the city of Sydney. The so-called tramways of this city are nothing more nor less than street-railways. The cars are drawn by locomotive engines, which make as much noise (by whistling and otherwise) and travel as fast as those upon enclosed tracks. In addition to this there are usually more cars than one behind each engine (sometimes as many as four), and before the first point of divergence one set of cars follows another with greater rapidity than do the trains of the Metropolitan Railway. There are special stopping places for taking up and setting down passengers, and, as in London, other traffic moves freely upon the rails except when cars are actually passing. It may therefore fairly be said that London, New York, and Sydney have respectively solved the question of providing railway communication between the city and suburbs, by running their trains underground, overhead, and on the street level. The trams of Sydney are government property.

Without committing one's self to the assertion that Sydney trams are dangerous nuisances which should not be tolerated, they are nevertheless suggestive of thoughts on the subject of nuisance generally. And it may be remarked in the first place that public utility will sometimes permit a state of things which will not merely deteriorate the property, but endanger the very lives of members of the public. Such an accident as that which produced the case of *Rex* v. *Pease* (4 B. & Ad. 30) might very possibly have been followed by loss of life. Yet the principle held, that injury in one respect was compensated by benefit in another; and it was maintained by most of the judges in *Rex* v. *Russell* (6 B. & C. 566), that even at common law a nuisance was thus justified. Much more then when the annoyance has been expressly sanctioned by the legislature.

Another consideration is suggested by observing the date of the case of *Rex* v. *Pease*, which was 1832. Steam railways were then in their infancy, and horses were unaccustomed to the new phenomenon. We have now many railways running across and parallel to various thoroughfares, and the noise and appearance of the locomotive engine has become familiar. The probability, therefore, of a repetition of similar circumstances is greatly diminished, and the balance augmented on the side of public advantage. So in the case

of the Sydney trams, we observe horses moving quietly in the presence of an apparition which, did it appear in London, would produce a panic the consequences of which it would be hard to estimate. Thus the legislature may be justified, in considering whether a particular state of things shall be permitted, in considering ultimate results, after the novelty has worn off, as well as the immediate effect.

But in the absence of such special permission, the protection afforded to individuals engaged in dangerous or offensive works is, according to several modern decisions, exceedingly insecure, however important those works may be. And the tendency is decidedly in the direction of increasing the restrictions laid upon them. In the case of *Rex* v. *Russell* (6 B. & C. 566) an indictment was preferred against a wharf owner for erecting staiths in a navigable river, he not having had special authority for the act. The judges, who were not all agreed, held this much in common; that the mere want of a previous writ of *ad quod damnum* was not in itself conclusive against the defendants. Yet the Chief Justice (Lord Tenterden) remarked upon the desirability of a man's procuring this sanction before taking upon himself to act in a possibly offensive manner. Without such a protection, all such works are carried on at the operator's peril, and whether public advantage should be allowed to outweigh public inconvenience constituted the point of difference in the above case.

Rex v. *Russell* is a much older case than that of the *Attorney General* v. *the Mayor of Leeds* (39 L. J. Ch. 254). In this case it was held that public nuisances cannot be tolerated merely upon the ground that a balance of convenience is on the side of permitting their existence. Nor was the argument admitted that the case of a dispute between two portions of the community differed from that of a private individual. Infringement of rights is a breach of the law whether committed by individuals or by aggregates.

But not even length of time will always secure the individual from interruption. The well-known case of *Sturges* v. *Bridgman* (11 Ch. D. 852) very decidedly lays down that there can be no prescription acquired to make noise in a place where, though never so long continued, no person had previously been able to complain of it, owing to no annoyance having been caused. And in the argument and judgment in that case it was pointed out that a person wishing to preserve his rights inviolable, could do so by securing so much ground as would for ever prevent his occupation from becoming a nuisance. The only other way is by special permission from lawful authority; not necessarily from Parliament, but perhaps from some local board having powers to grant the same.

And with respect to the principles upon which such authority should be granted, it would seem evident that the question must turn upon one of paramount public good. Two of the judges in *Rex* v. *Russell* held that, though an enterprise be started with the sole idea of profiting the proprietors, yet the public benefit which would ensue must be taken into consideration in deciding upon its lawfulness. More recent cases negative this proposition, but at all events public benefit is considered when special authority is applied for. It is on this principle that railways are tolerated, which are, at least when owned by private corporations, primarily made with a view to personal advantage. And it was justly pointed out in *Sturges* v. *Bridgman* that a considerable disturbance of national trade would ensue, were it possible for one individual to stop all the manufactures of a particular district by going to live there. Does then the over-ruling of *Hole* v. *Barlow* (4 C. B. N. S. 334: 27 L. J. C. P. 207) so completely put aside the question of a 'convenient' locality, that this consideration can never again arise in deciding a case?

Three courses are at present open to those who wish to pursue lawful occupations, which are nevertheless attended with unpleasant accompaniments.

(1) To choose a spot remote from human habitation, and to trust to probabilities to be left undisturbed till a prescriptive right may be acquired.

(2) To secure so much land to one's self as to reduce to a minimum the possibility of the occupation becoming an annoyance.

(3) Where possible, to obtain special permission from Parliament, or some minor constituted authority, to perform the act desired.

The first of these precautions is adopted by cemetery companies, and indeed, the law compels them to permit no interment within 100 yards of a dwelling (see 18 & 19 Vict. c. 128). But as there is nothing to prevent human habitations from approaching the ground which was originally sufficiently remote for the purpose, the security thus provided is very imperfect. And the opinion has long ago been abandoned that a nuisance is unassailable if only it were established before the approach of the parties annoyed thereby.

The second precaution might be attended with much inconvenience. To consider again the case of a cemetery company. Could such a corporation secure to itself so much land that it could always have a clear margin of 100 yards between its burial sites and the nearest inhabited house? Were it possible for the company to do this, so far as commercial success were concerned, how far would the statutes of Mortmain permit such a proceeding? And private individuals would in many cases find the expense of procuring so wide a reach of ground such as to render nugatory all their operations.

The third measure is that which is taken by railway companies, and in their case compulsorily. And this seems at once to be the safest and justest, and, were we more familiar with it, it would be the most obvious. Lord Tenterden pointed out in *Rex* v. *Russell* (6 B. & C. 600), that neglect to apply for such special permission furnishes an argument against the propriety of one's act, and intimates the party's apprehension that an enquiry may be unfavourable to his views. The course would ensure safety, because 'actus legis nemini facit injuriam,' and there are cases enough besides that of *Rex* v. *Pease*, to show that whatever be properly done and with permission from authority may be done without fear of legal consequences. And it would be just, because, before permission be granted, due consideration would be taken of the interests of all parties affected, and compensation where possible decreed for loss occasioned. The balance would be adjusted so far as possible between public advantage and the regrettable but inevitable disturbance of individual benefit which a new order of things cannot fail to produce.

It is moreover an obvious proposition, that the older and more thickly peopled a country, the greater will be the danger of a particular occupation becoming a nuisance. In such new and little-populated countries as the colonies of Australia, probably no difficulty would be experienced in finding a suitable spot for any desirable occupation, however noisy or otherwise offensive. But the case is vastly different in England. The rapidly-increasing population of an already over-inhabited country is daily becoming a more perplexing question to political economists. And side by side with this population we have our great collieries and factories which occupy space, render air and water impure, and emit discordant noises night and day. To stop the works in question would ruin the trade of the country. Their continuance must in some way be reconciled with the rights of the surrounding inhabitants. Notwithstanding the decision of *Bamford* v. *Turnley* (31 L. J. Q. B. 286) the question of a suitable spot for important but unsavoury operations would seem to be one necessary to consider. It is indeed recognised in the dictum (propounded in *Sturges* v. *Bridgman* and elsewhere) that what would be a nuisance in one place is not necessarily so in another. But does this sufficiently protect the manufacturer? It is at all events held that a new operator may be restrained from emptying his refuse into a stream which older ones had acquired a prescriptive right of polluting (see *Wood* v. *Waud*, 3 Exch. 772). Could a manufacturer be equally restrained from adding to noise or smoke who chooses a site for his works in a locality already devoted to similar purposes? According to present

law, mere choice of a spot as suitable as possible is a very inadequate protection.

Much therefore might be said in favour of allowing particular works to be specially licensed by Act of Parliament, analogous to the way in which it is now necessary to license the construction of railways, the erection of slaughter-houses, &c. The manufacturer and the public would be alike benefited by the measure. The former would pursue his trade peaceably and without dread of interference or injunction. The latter would be assured that a license would only be given after due consideration of all circumstances, including that of locality. Thus important operations would not be stopped, while the necessary attendant annoyance would be confined within as small a limit as possible.

But railways and tram-lines confer rights upon the public, and not advantages merely. With certain necessary exceptions, all mankind can claim carriage for themselves and their goods to an unlimited extent. And in the argument of *Rex* v. *Russell*, it was maintained that where a public right is infringed, another public right, and not merely a public benefit, must be given as an equivalent (see B. & C. 578).

Would it not be possible to carry out this principle were the system admitted of licensing particular offensive works? If a condition were attached to the issuing of such license to the effect that the public might, so far as possible, claim the full benefit of the works in question, there would be a still greater equilibrium between public annoyance and public utility. And the duty imposed on the manufacturer would be no more than a just return for the benefit conferred, while the danger would be averted of great operations becoming instruments of oppression in the hands of a few monopolists.

It is not maintained that works of the character described should be compulsorily licensed, but only that this means might be open to the manufacturer of guarding himself against the growing tendency to restrain his proceedings. Is he not fairly entitled to further security than the slowly-perfected right of prescription, especially after *Sturges* v. *Bridgman* has decided that in some circumstances even this cannot be acquired? The rights of the public are now well guarded; it is on the other side that security is needed. And the probability is that but few manufacturers would not gladly avail themselves of the protection offered. Those who preferred to carry on their works at their own risk would, as now, be liable to interruption through injunction, but there would be no reasonable ground of complaint were a means of escape open to them, not to avail themselves of which was their own sole act.

A further consideration in favour of such a licensing system would be its effect upon the revenue. The principles of taxation are a question rather for the political economist than the lawyer; nevertheless this much may be stated here, that the tax which purchases for the payer a specific personal advantage is generally to be preferred to that which is a necessary yet decided mulct. New means of meeting the necessities of the revenue are constantly being looked for; would not that above suggested possess the threefold advantage of yielding a valuable income, giving *quid pro quo* to those from whom it was taken, and guarding the interests of the community generally? The cost of producing the article might be increased, but advantages on the other side would compensate for this.

And the reasonable conditions and restrictions essential to the safety and health of the public, such as the using of the best approved appliances, or fencing in dangerous places, could be specially imposed when a special permission is sought; not a small consideration; for although the common law gives damages to a person injured by an unlawful nuisance, yet prevention is better than cure, and the majority of individuals would far rather not lose a limb at all than receive any amount of pecuniary compensation for the injury. There is an Australian case of *O'Brien* v. *the Board of Land and Works* (6 Vic. L. R., law 204), nearly identical with the English one of *Ellis* v. *Sheffield Gas Consumers' Co.* (2 E. & B. 767), but with this extension, that where a company has obtained authority to do what would otherwise be an unlawful act, and delegated the work to a contractor, even then it is incumbent on the company to exercise control over the contractor to see that it be done in a proper way. By specific conditions the general safety would be guarded in a still more effective manner than by the common law of tort. Public safety would be increased rather than diminished by permission so granted.

In the absence of some such provision being made as above suggested, will not the difficulty yearly increase of knowing how to deal with works of the nature described? New operators will be afraid of hazarding interruption; those who have already acquired prescriptive right may relinquish their occupations, or present operations may become inadequate to meet the pressure of future necessity. Such considerations would seem to urge some intervention by statute on the subject in question, for the common law on the subject cannot at present be said to be in a satisfactory state.

T. Crisp Poole.

THE LAW OF ESCHEAT.

LATE in the Session of last year the Lord Chancellor introduced into the House of Lords a Bill 'for repealing certain enactments relating to Escheators and the procedure in cases of Escheat; and for regulating the procedure in such cases.' The Bill appears to have passed through both Houses almost without debate, though it did not escape the nearly inevitable 'block' in the Lower House. At the instance of the Attorney-General, considerable additions were made in Committee of the House of Commons, and the Bill eventually passed into law as the Escheat (Procedure) Act, 1887 (50 & 51 Vict. c. 53).

A Memorandum, which was issued with the Bill, gives the key to its real object, and, at the same time, to some of its main defects. 'Since the abolition of feudal tenures,' says the Memorandum, 'the enactments relating to escheat and escheators have lost their general importance. With a view to the preparation of a new edition of the Revised Statutes, it is proposed to repeal these enactments.' Similar Acts dealing with the law relating to the office of sheriff and of coroner have been passed for the same object at the instance of the Statute Law Revision Committee. It was hardly to be expected that much improvement should be effected in the law of escheat by a Bill promoted by persons not interested in that branch of the law and for purposes entirely foreign to it. It is, therefore, scarcely a matter for surprise that, in the attempt to reduce the bulk of the Statute Book, the law of escheat shall not have been greatly the gainer. The Act under consideration repeals eleven statutes enacted between the years 1300 and 1548, and has thereby effected a saving of about sixteen pages for the new edition of the Revised Statutes. A few old statutes relating to escheats have been left untouched, and on what principle the eleven repealed have been selected from among the others it would be difficult to say. It can hardly be that the former statutes do not fall within the scope of the Act. Though it is evident from the title and from the recital in the preamble that the Act was intended to deal only with the practice in cases of escheat, some of the statutes repealed are concerned with questions of law, and define carefully the rights of the subject against the Crown. It would be a mistake, too, to suppose that the Acts repealed are those, and those only, that in the changed circumstances of our time have become obsolete.

Perhaps no enactment of the Session of 1887 could furnish a better illustration of the unfortunate manner in which our laws are passed. The subject of escheat is a small one, and with some care all necessary provisions relating to it might have been included in a Consolidation Act of very moderate size. All the old statutes might then have been repealed, and, for ordinary purposes, it would have become unnecessary to turn to the legislation of 500 years ago. No one can doubt that infinitely greater service would have been rendered by such a re-casting of the form of the law as to make it intelligible and accessible to every inquirer, than by merely sweeping away 'certain' enactments, and leaving others to stand, to the confusion of the student of this portion of the law. But a consolidation or codifying Act would have required much thought and pains in the preparation, and, no doubt, was not the work for which the Statute Law Committee was appointed. The interest of that body in the law of escheat extended to this (and no further), that a saving of sixteen pages in the Statute Book could be effected by a repealing Act, and a repealing Act was consequently put forward. It was not, apparently, until some weeks after the Bill had been introduced into Parliament that it occurred to somebody that the Acts proposed to be repealed laid down some principles of law that were by no means obsolete, and that certain of these would require re-enacting. Important additions were therefore made to the Bill, and one of the statutes was omitted from the Schedule of repeals in Committee of the Lower House. By this means the Bill attained the heterogeneous character which it has retained as an Act. Its faults are to be attributed, not to the defective machinery for passing Bills through Parliament, but to haste in the conception and drafting of the Bill. There is no good reason why a Bill, dealing with a non-controversial subject, should not be presented to Parliament in a complete condition. The effect of every clause ought to have been carefully weighed beforehand, and every case within the scope of the Bill provided for, as far as practicable. Work of this kind, it must be repeated, cannot be expected from a body appointed for other purposes, like the Statute Law Committee, or from any lawyer or parliamentary draughtsman who is not an expert in the particular branch of law dealt with; but it may not be out of place to say here that such specimens of legislation as the Escheat (Procedure) Act, 1887, show the pressing necessity for the appointment of some commission or other permanent body authorised to deal with the form and expression as well as with the mere bulk of our statute law.

The Act consists of three sections in all, the first giving the short title. Section 2 gives (sub-section 1) power to the Lord Chancellor,

with the assent of the Treasury, to make rules for the *procedure* on and incidental to and consequential on the holding of inquiries into the title of Her Majesty in right of the Crown, or the title of the Duke of Cornwall, to any real estate or any interest therein, in cases of escheat or alleged escheat, whether in relation to the Crown or otherwise, or the holding of any inquest of office, not otherwise regulated by law. (2) Such rules are to provide that an inquisition touching real estate *shall find of whom the real estate was held*, and that every inquisition shall be forthwith returned into the Central Office of the Supreme Court of Judicature, and that every person aggrieved by any such inquisition *shall be entitled to traverse* the same, or to object thereto in such manner as may be from time to time directed by rules of Court. (3) Subject to the provisions of Section 6 of 'The Intestates Estates Act, 1884,' no grant shall be made of any real estate alleged to be escheated, until after the inquisition finding the title thereto has been returned to the Central Office. (4) An inquisition shall not prejudice any rights which, at the time of the death of the person that led to the inquisition, were vested in some other person. (5) If the inquisition does not find of whom the real estate was held, any person aggrieved shall be entitled to obtain from the High Court an order for the taking of another inquisition. (6) The Act is to apply with certain modifications to inquiries into the title of Her Majesty in right of her Duchy of Lancaster. (7) All rules are to be laid before Parliament within a certain time after they are made, and are to be judicially noticed and have effect as if enacted by the Act.

The provision in sub-section 2 that the inquisition shall find of whom the real estate was held is perhaps in form a matter of procedure, but in substance it involves an important question of law. Instances still occur from time to time in which escheats are claimed by the lord of a manor or other private person entitled to the immediate seignory, and the finding by the jury at the inquest determines, subject to the right of traverse or to the issue of a *melius inquirendum*, the question whether the Crown or a mesne lord is entitled. Again, it is provided that every person aggrieved by an inquisition shall be entitled to traverse the same. The substantial effect of this part of the clause is to confer on persons having any claim a right to institute proceedings against the person in whose favour the office has been found, and it can hardly be contended that the words extend only to a regulation of the form of the proceedings to be taken. It is not clear whether this sub-section has the effect of entitling the Crown to traverse an inquisition when the finding is against the Crown. The words are probably sufficient to extend to the Crown if taken in their ordinary signifi-

cation and by themselves; and no doubt the Queen is a 'person' in one sense (Jessel, M.R., *In re Mercer and Moore*, 14 Ch. D. 295). But the difficulty is that this clause was probably intended to take the place of some of the repealed enactments giving a right of traverse, and under the old law it is clear that the Crown cannot traverse as the subject can, but, if dissatisfied with the result of an inquest of office, must direct the taking of a further inquisition. It is to be regretted that the intention of the framers of the Act has not been more clearly expressed.

Sub-section 3 re-enacts a principle of law that was formerly considered to be of great constitutional importance. Grievous complaints were from time to time made of the conduct of the king's escheators in seizing lands without the authority of an office found for the king, and of the king's ministers in causing grants of such lands to be made without office found and so depriving the person lawfully entitled thereto of an opportunity of tendering a traverse, and four of the statutes now repealed (8 Hen. VI. c. 16; 18 Hen. VI. c. 6; 1 Hen. VIII. c. 8; and 1 Hen. VIII. c. 10) were particularly directed against this evil. More will be said on this subject in a subsequent part of the paper.

Sub-section 5 appears to have been enacted in substitution for a section (numbered 5 in the Rev. Stat.) of one of the repealed Acts, 2 & 3 Edw. VI. c. 8, which provided that where any inquisition or office should be founden by these words or like *Quod de quo vel de quibus tenementa praedicta tenentur Juratores praedicti ignorant*, or else founden holden of the king *per quae servitia ignorant* or such like, it should not be taken for any immediate tenure of the king *in capite*, but in such cases a *melius inquirendum* was to be awarded. An inquisition not finding of whom the lands are holden is in substance the same as one finding the ignorance expressly (*Doe* v. *Redfern*, 12 East, 115). It is, however, laid down that the *melius inquirendum* is grantable only on the part of the Crown, and that the proper remedy of the subject is by way of traverse (*Exp. Roberts*, 3 Atk. 6). 'If the office be found against the king, a *melius inquirendum*, or further inquiry under the former commission, may be awarded for the king' (Chitty's Prerogatives, 258). The language of this sub-section may possibly be taken as extending the remedy by *melius inquirendum* or by procedure analogous thereto, to a lord of the manor or other private person entitled to the immediate seignory. But it is doubtful whether this procedure can be applied as against the Crown, and whatever be the proper construction of this sub-section, it will probably not work any considerable change in practice.

The third and last section of the Act repeals the Acts mentioned

in the Schedule to the extent therein mentioned, and after providing that this repeal shall not affect anything done before the commencement of the Act, or then pending, goes on as follows:—'Except so far as may be otherwise directed by rules under this Act, any procedure or practice heretofore in use under the provisions of any Act hereby repealed or otherwise may be used as if this Act had not been passed.' A more unfortunate course could hardly have been adopted, though this clause throws great light on the methods of legislation in England. A practice in use under the provisions of an Act of Parliament must, it is submitted, be interpreted and controlled by reference to that Act, and if, therefore, a question arises as to the validity or extent of the practice, it will be necessary to turn to the Act. The result in the present case is that while, in so many words, the Acts are declared to be repealed, the practical effect of the clause quoted above may be to keep them in force, and the student may still be put to the inconvenience of having to refer to Acts of Parliament that, on account of their so-called repeal, are altogether omitted from collections of the statutes, or are not set out at length.

The power given by the Act to make rules for regulating the procedure in cases of escheat may be of considerable service. It is the belief of the writer that considerable changes in the mode of finding the title of the Crown to escheated lands might be made with advantage, and some of these will be mentioned at the conclusion of this paper.

The conception of escheat is inseparably connected with the idea of tenure. It proceeds upon the assumption that all lands in the occupation of a tenant are held of some superior under certain conditions, by virtue of an original grant. The tenant is not the owner of the land, but only of an *estate* in the land, and upon the determination of this estate, the feud falls back into the lord's hands by a termination of the tenure. 'When there is no longer any tenant, the land returns, by reason of tenure, to the lord by whom, or by whose predecessors in title, the tenure was created' (*A. G. of Ontario* v. *Mercer*, 8 App. Cas. 772). The nature of title by escheat has been much disputed. According to the point of view from which it has been regarded, writers have called it a species of reversion, a purchase and a descent. Strictly speaking, it comes under none of these denominations. There cannot, in the usual and proper sense of the term, be a reversion expectant upon an estate in fee simple. It is said to partake of the nature of a purchase because some act of the lord is requisite to perfect his title, and the actual possession of the land cannot be gained till he enters, or (before 3 & 4 Will. IV. c. 27. s. 36) till he brought his writ

of escheat. But Mr. Hargrave points out (Co. Litt. 18 b. n.) that the lord's title to take possession commences immediately on the want of a tenant and is vested in him by mere act of law, though he must do some act to put himself into the *actual possession*. To consider escheat, again, as a title by descent, implies an entire misconception of its nature. The lord does not take (as has been often inaccurately said from Glanvill downwards) as *ultimus haeres*, by way of succession or inheritance from the last tenant. The lord does not take as heir, but because there are no heirs. The tenant's estate (subject to any charges upon it which he may have created) has come to an end, and the lord is in by his own right.

In *Burgess* v. *Wheate*, 1 Eden, 191, Sir Thomas Clarke, M.R., drew a distinction between a reversion in default of heirs, and an escheat, where there was an heir and by civil law impediment he could not take. 'The *reverter* took place when the grant expired naturally, and the heirs failed in length of time. In case of *escheat*, it was cut off by civil law impediment, and was an accidental determination of it.' This seems to agree with Lord Coke's statement that an escheat is a casual profit, *quod accidit domino ex eventu et ex inopinato* (Co. Litt. 92 b). The term was also once applied to other property which fell to the lord, 'by chance and unlooked for,' as trees blown down, &c. In course of time, however, the lord's right to have the land returned on the expiration of the grant as a so-called reversion was confounded with his right on the determination of the tenure upon some unforeseen contingency, and in both cases alike the right was called an escheat.

In order to convey a correct idea of this branch of law, it cannot be too often insisted that an escheat is in its nature an incident of tenure. It is the more necessary to keep this origin of the conception in view from the fact that it has been ignored or misunderstood in many of the authorities, and things having no connection with the relations of lord and tenant have been classed among escheats. An escheat, it must be remembered, never falls to the king, as such, but goes always to the lord of the fee. Great confusion still exists on this point, arising from the fact that mesne lords are now seldom found, and that the Crown is commonly entitled as the immediate lord. The title of the Crown to escheats is entirely based upon the feudal idea that all land is held of some superior, and that, where no badge of tenure can be traced, the land is to be considered as held immediately, as well as ultimately, of the Crown. The king is lord paramount, and where no intermediate lord appears to claim, all tenants are assumed to hold of him directly by service of mere fealty. The distinction which exists between the cases in which the lord takes lands as lord paramount, and those in

which he takes by virtue of his royal prerogative, has not always been kept in view. A reference to the old law of forfeiture for crime may make the matter clearer. A person attainted for felony or petit treason was deprived of all his lands, and these went to the lord of the fee as an escheat, subject to the king's day, year and waste. But if the crime were high treason, the king, as representing the injured state, had the land by forfeiture, of whomsoever it was held, and not in respect of any escheat by reason of any seignory (2 Inst. 64). These forfeitures of traitors were given to the king by the common law, and did not depend upon the law of feuds or tenures, and the distinction was recognised and continued in the Statute of Treasons, 25 Edw. III. st. 5, c. 2. It has been asserted by some writers that lands coming to the lord's hands on the tenant's attainder for felony cannot properly be called escheats, and they are said to be more correctly called forfeitures (see Scriven on Copyholds, 4th ed. 631). It is, however, submitted that since the lord in this case takes by reason of tenure, or rather of the extinction of tenure, the term escheat is properly employed, and that the term forfeiture should be restricted to those cases in which the lands of the offender passed to the king in his sovereign capacity. The operation of attainder for felony was greatly narrowed by 54 Geo. III. c. 145, and was entirely abolished by the Felony Act, 1870, 33 & 34 Vict. c. 23. The matter is therefore now of little importance, though the Act of 1870 does not operate retrospectively.

There were other cases where lands became vested in the Crown by prerogative right in which the same confusion with rights depending upon tenure may be noticed. Thus an alien might purchase, but was by law incapable of holding lands by purchase. On such a purchase being made, the king by his prerogative became entitled to the lands, and this right has often been called an escheat. But upon examination it will be found to differ from an escheat much in the same way as a forfeiture, in the strict sense, differs. The king, and not the mesne lord, was entitled to the alien's lands of whomsoever they were held. And yet this right was not to be considered as accruing in consequence of a penalty or forfeiture, but as arising merely from the policy of the law (*A. G.* v. *Duplessis*, 2 Ves. 287). Another case mentioned in some of the older statutes and books is that of the *Terrae Normannorum*. After the separation of Normandy from England, the King of France seised the lands which the English held in Normandy, and the King of England in like manner seised the lands which the Normans held in England. Land so seised was said to be the king's escheat of Normandy, and was not regarded as a common escheat, 'for it cometh to the king by reason of his person and crowne' (*Riparare's case*, 2 Inst. 64).

The Normans were considered to be public enemies, and the king, as the representative of the State, became entitled to their lands as forfeitures. The terminology employed by Spelman is not free from ambiguity. Escheats are by him divided into Regal and Feudal. 'Regal,' says he, 'are those obventions and forfeitures which belong generally to kings, by the ancient right of their crowns and supreme dignity. Feodal are those which accrue to every feodal lord, as well as to the king, by reason of his seignory' (Feuds and Tenures, ch. 23). The error in speaking of royal escheats is noted by Sir Martin Wright, who points out (Tenures, p. 117) that such lands or tenements as are not held immediately of the king and yet happen to him upon the commission of any treason, are not escheats but forfeitures.

When the feudal system flourished in full vigour in this country, the causes of escheat were numerous, and this incident of tenure was a source of considerable profit to the lord. Besides the failure of an heir who could inherit and the commission of felony, the tenant might do many acts which let in the lord to claim the land as an escheat. Thus the heir originally took by purchase and independently of the ancestor to whom the grant was made, and any attempt to alien the land made by either the grantee or the heir operated as a cause of seisure by the lord. By the time of Bracton the heir was held to take by descent, and a power of alienation, with the leave of the lord, was introduced. Cases of escheat still arose through the efforts of the tenants to alien without obtaining the lord's licence, but, as to tenants *in capite*, it was provided by 1 Edw. III. c. 12, that in such cases the king should not hold the lands as forfeit, but that a reasonable fine should be taken. The next step in favour of the tenant was a practice which arose of making a larger grant, i.e. to him, his heirs, and *assigns*. This enabled the tenant to alien without licence, but so only that the lord was not prejudiced by a lessening of the service rendered. In course of time the mention of assigns became unnecessary, and liberty of alienation was allowed where the grant was only to the tenant and his heirs. Logic demanded that one further step should be taken. As the tenant had the power to defeat the lord's right to an escheat by any mode of alienation, he ought consequently to have every inferior power. The lord accordingly was held, on taking by escheat, to be liable to the incumbrances created by the last tenant. Alienation in mortmain to religious houses was more stringently forbidden, since lands so given continued in unchangeable perpetuity without descending to an heir, and therefore never produced the casualties of escheat and other feudal incidents. This form of alienation was forbidden by *Magna Carta* (c. 36), and lands so given

were to accrue to the lord of the fee. It became the practice for a person wishing to make a grant in mortmain to apply for the king's licence to do so, and thereupon an inquisition *ad quod damnum* was taken in pursuance of a writ directed to the escheator, in order to ascertain what loss of feudal profits would be sustained by the Crown or other lord of the fee, if the grant should be sanctioned. If the tenant erected crosses upon his houses or tenements in prejudice of his lord that he might claim the privilege of the *Hospitalers*, to defend himself against his lord, he forfeited his tenancy (Co. Litt. 92 b). Outlawry had the same effect in entitling the lord by escheat, as an attainder for felony, and escheat or forfeiture consequent upon outlawry is not affected by 33 & 34 Vict. c. 23. Glanvill gives another case:—*Si quae mulier, ut haeres alicujus in custodiam domini sui devenerit, si de corpore suo forisfecerit, haereditas sua domino suo pro delicto ipsius remanet escaeta* (Lib. VII. c. 17).

Changes in the law of inheritance and descent have also greatly decreased the occasions of escheat. Thus the doctrine of corruption of blood in consequence of attainder for treason or felony not only made the person attainted incapable himself of inheriting, or transmitting his own property by heirship, but also obstructed the descent of lands or tenements to his posterity, in all cases where they were obliged to derive their title through him from any remoter ancestor. Lands, again, would before 3 & 4 Will. IV. c. 106 (which also abolished the above-mentioned effect of attainder) have escheated rather than have ascended from son to father (*haereditas quidem nunquam naturaliter ascendit*), or rather than have devolved on any kinsman, however near, related only by the half blood. Further, the estate was never allowed to go to the maternal line after having once gone to collaterals *ex parte paterna*. And, lastly, down to the year 1859 (22 & 23 Vict. c. 35, s. 19) an escheat would have taken place on the death of the person last entitled to land, if no heir of the blood of the purchaser were in existence, although the last owner might have left a person related to *him* by consanguinity and able to take as heir. Under the feudal system, again, the tenant had no power to defeat the lord's rights by a devise of his lands by will. But liberty of testamentary alienation gradually arose, and the occasions of escheat became much fewer on this account.

On the other hand, under the provisions of some modern statutes property will now escheat in cases where formerly no escheat would have occurred. The Bankruptcy Act, 1869, for instance, enacted (sec. 23) that certain property disclaimed by the trustee in bankruptcy should revert to the person entitled on the determination of the estate or interest of the bankrupt. In *re Mercer and*

Moore, 14 Ch. D. 287, where freehold property, subject to an equitable charge, had been disclaimed by the trustee of the mortgagor, Jessel, M.R., was of opinion that the Crown was entitled. 'There is no person literally entitled upon the determination of the freehold to take except the Crown. If a freehold estate comes to an end by death without an heir, or by attainder, it goes back to the Crown on the principle that all freehold estate originally came from the Crown, and that where there is no one entitled to the freehold estate by law, it reverts to the Crown. If this [section] means literally the determination of the estate anyhow, it may determine by bankruptcy as well as by attainder, and then literally this section would seem to give it to the Crown.' The Master of the Rolls probably meant that the lord of the fee was entitled, but considered the probability of a mesne lord coming between the tenant and the Crown so remote as to be capable of being disregarded until some such claim were put forward. The wording of sec. 55 (2) of the Bankruptcy Act, 1883, is different, and it remains to be seen whether the Court will put a like construction upon it. But in any case property disclaimed is not likely to prove a very valuable acquisition. A more important occasion of escheat is to be found in sec. 4 of the Intestates Estates Act, 1884, which will be presently referred to.

All lands and tenements held in socage (and formerly lands held by knight service), whether of the king or of a subject, are liable to escheat. So also are shares in the New River Company (*Davall* v. *New River Co.*, 3 De G. & S. 394). The feudal fiction of an original grant was, however, kept up by the condition that the estate or benefit escheating must have been capable of being granted, and therefore there was no escheat at common law of possibilities, or conditions strictly so called, or rights of action, which could not be granted. From the nature of an escheat, too, it follows that it must be of the entire fee; therefore an estate tail does not escheat, but the land goes to the person in reversion, unless the tenant in tail has also the reversion in fee in him, for, in that case, the whole estate will escheat. An estate in reversion or remainder is subject to the ordinary law of escheat, and it is submitted that the lord may at once establish his title thereto without waiting until it becomes an estate in possession. The old Saxon tenure of gavelkind retained many of the characteristics of Anglo-Saxon law, and among others an immunity from escheat on the attainder of the tenant for felony, though both before and after the Conquest gavelkind lands were liable to forfeiture for treason. It is often said that copyholds do not escheat to the Crown, but to the lord of the manor. But the term escheat can only be applied in a loose and inaccurate manner

to copyholds which are held 'at the will of the lord according to the custom of the manor.' The freehold remains in the lord, and upon the death of the tenant intestate and without an heir, his interest falls into the fee and is extinguished, unless a regrant is made. The better opinion seems to be that customary freeholds, which are held not at the will of the lord, but according to the custom of the manor, stand on the same footing, though here the freehold is sometimes in the tenant. The principle that money directed to be laid out in the purchase of land is to be considered as real estate, will not be applied by a Court of equity for the benefit of the Crown or a mesne lord, claiming by escheat. It has been broadly asserted that the Crown comes under no head of equity (Lord Loughborough in *Walker* v. *Denne*, 2 Ves. jr. 184) and cannot, therefore, call for the conversion to be effected. A stronger objection to the claim of the lord is pointed out by Mr. Lewin (Law of Trusts, 8th ed. 940), who says that in such a case there can, as a general rule, be no claim for an escheat by any one, since, until the land is actually purchased, it is uncertain who will fill the character of lord. In *Walker* v. *Denne*, it seems to have been assumed that the Crown would be the lord. As escheat is said to be a consequence and fruit of tenure, the principle was only applied, under the old law, to whatever lay in tenure. Thus a rent-charge, rent-seck, right of common, fair, market, free warren, corody, or any kind of inheritance that is not holden, would not have escheated on the death without heir and intestate of the person last entitled, but would have become extinct. An alteration of the law has been made by section 4 of the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), which extends the law of escheat to any estate or interest, whether legal or equitable, in any incorporeal hereditament. It is believed that no case of a claim under the Act, by the Crown or a mesne lord, to an escheated incorporeal hereditament has yet come before the Courts, and it is apprehended that considerable difficulty may arise in the working of this attempt to impose an incident of feudal tenure upon property which is not held of any lord, mesne or paramount. In a case which will presently be referred to more at large, it was decided that a trust estate did not escheat on the death of the *cestui que trust* without heirs, but that the trustee, in such a case, might continue to hold the land in the absence of any person able to establish a claim. An use before the Statute 27 Hen. VIII. c. 10, was not liable to escheat because it did not lie in tenure, and trusts followed, for this purpose, the old law of uses. The same section, however, of the Intestates Estates Act enacts that any equitable estate or interest in any corporeal hereditament, whether devised to trustees or not, shall escheat as if it were a legal estate.

It has been said that there cannot properly be a reversion expectant upon the determination of an estate in fee simple. In the case, however, of a grant of lands to a corporation and its successors, it is laid down that upon the dissolution of the corporation, there shall be no escheat of the land, but that it shall revert to the donor, by virtue, says Lord Coke (Co. Litt. 13 b), of a condition annexed by law to every such grant. It may, however, be doubted whether this exception would now be upheld in a Court of law. Cases may arise, too, under settlements, in which, on the death of the person last entitled, intestate and without heirs, the lands will not escheat, although the whole estate of the settlor appears to have been divested by the deed. The provision that equitable estates shall be subject to escheat will not give the lord a claim, for it is held that in such case the settlor only intended to exclude himself in favour of certain specified persons, and when these no longer exist, a resulting trust is raised by construction of equity in favour of the settlor.

The position of the lord taking by escheat with regard to the escheated property is not in all respects the same as that of a person taking by grant, devise or descent. The lord comes in by title paramount: his estate is quite independent of the estate of the tenant which has expired. He comes to the estate in the *post*, according to the old technical phraseology; that is to say, by a title paramount that of the person on whose death without heir the right of escheat attaches. His independence of the estate of the last tenant is attended with peculiar consequences, which may work either in his favour or to his disadvantage. Thus it is laid down that the lord by escheat shall have the rent reserved on a lease by the tenant, but he cannot re-enter for condition broken, because he has no privity with the lessor. The right of distraining for the rent is in the lord, not as heir, but as incident to his reversion. Again, for the purpose of binding the lord in escheat, deeds have been held good against him that would have been void or voidable in other respects, as a feoffment of an infant with livery. The lord will also take subject to any incumbrances created by the last tenant, because the power of creating lesser estates is incident to a fee simple, and an exercise of that power is therefore binding on the lord. Thus if the last tenant had granted a rent or demised the land for a term of years, by way of mortgage or otherwise, these partial alienations will bind the lord. So the incidents of dower and curtesy may attach to the land in derogation of the lord's right. The lord is sometimes prejudicially affected, not only by the act of the last tenant or by rules of law annexing incidents to the tenant's estate, but by statutory enactment impressing certain qualities upon the

land itself. Thus in *Evans* v. *Brown*, 5 Beav. 114, it was held that under Romilly's Act, 3 & 4 Will. IV. c. 104, lands coming to the lord by escheat were assets in his hands for the payment of the debts of the last tenant. This Act, however, would probably be held not to apply where the escheat is to the Crown, as the Crown is not expressly named in it. The reason that the lord taking by escheat is subject to incumbrances in general is that they are annexed to the possession of the land without respect to any privity; but the lord is not subject to any incumbrances annexed to the privity of estate. A trust, for instance, is only a personal confidence between the trustee and the *cestui que trust*, and such confidence is a privity confined to them. On the death of the trustee, therefore, intestate and heirless, an escheat took place, and after considerable conflict of views, it was the better opinion that the lord took the land freed from the trust, and from any obligation to the *cestui que trust*. The same result took place where a mortgage in fee had been made, and the mortgagee died intestate and without heirs. But it was naturally thought to be inequitable that any benefit should be taken by the lord when a merely technical escheat of this kind took place, and various statutes were passed to mitigate or obviate such an inconvenient result. By 39 & 40 Geo. III. c. 88, s. 12, and 59 Geo. III. c. 94, the king is empowered to direct, by warrant under the sign manual, the execution of any trusts or purposes to which lands coming to him by escheat may have been directed to be applied, or to grant such lands to trustees for that purpose. These Acts do not, of course, affect a mesne lord to whom an escheat has fallen, but by 13 & 14 Vict. c. 60 (which repeals 11 Geo. IV. and 1 Will. IV. c. 60; 4 & 5 Will. IV. c. 23, s. 2; and 1 & 2 Vict. c. 69, whereby similar provisions were made) the Court is empowered, where a trustee has died intestate and without an heir and in certain cases where a mortgagee has died without an heir, to make an order vesting the lands in such person, in such manner, and for such estate as it shall direct.

The famous case of *Burgess* v. *Wheate*, 1 Eden, 177, decided in 1759, deserves attention for more than one reason. After a protracted course of litigation extending over eighteen years, the suit was finally decided by the Lord Keeper, Sir Robert Henley (afterwards Baron Henley and Earl of Northington), with the assistance of Lord Mansfield, C.J., and the Master of the Rolls, Sir Thomas Clarke. Shortly stated, the question was this. A, being seised in fee, conveys to a trustee to hold to such uses as he might appoint. He makes no appointment and dies without leaving any heir capable of inheriting. To whom does the land belong? An information was

filed by the Attorney-General on behalf of the Crown, insisting that the trustee had no beneficial interest, and that in default of appointment or heirs, the trustee held for the king's benefit and ought to convey to the use of the king. The Court, after elaborate argument, was divided in opinion, the Lord Keeper and the Master of the Rolls holding that there was no escheat to the Crown, while the Lord Chief Justice was of a contrary opinion. The judgment of the majority of the Court proceeded upon the ground that the right of escheat is not founded on the want of an heir, but of a tenant to perform the services. Where there is a legal tenant in possession neither the Crown nor a lord can enter or seise; the right to the service of the tenant in possession being all that the Crown or a lord can of right require. The fact that the tenant had no beneficial interest, but was a mere trustee, was held to make no difference. 'The transmutation to a trustee is the same in its consequences as the transmutation of possession without a trust; it conveys to the trustee the legal burthens, and it invests the trustee with the legal privileges.' The Court carefully abstained from saying that the estate *belonged* to the trustee, and put his right only on the negative ground that where the plaintiff has no right, the defendant may hold till a better right appears. Sir Thomas Clarke, indeed, intimated that if it were necessary for the trustee to come into a Court of equity in order actively to assert his right, he would receive no assistance from the Court, and the same view was taken by Lord Loughborough in *Williams* v. *Lord Lonsdale*, 3 Ves. 752. Practically the property, in cases of this kind, was without an owner, and the right of the trustee could not well be put higher than a right of occupancy which might, by lapse of time, become the foundation of a legal title. If the trustee had the legal estate and was in possession of the property, a Court of equity would not interfere with such possession by ordering a conveyance of the legal estate, at the instance of any one except a claimant through the creator of the trust. To use the old-fashioned phraseology, the Court would not grant a *subpoena* against the feoffee for any who was not in privity with the feoffor; and, therefore, the Crown, not claiming in any privity, could not have a *subpoena*. The contention that the Crown stood in the place of the *cestui que trust* and in some sort of fiduciary relation to the trustee, was rejected by the Lord Keeper. 'My objection,' said he, 'to the claim in the information is, that it is for the execution of a trust that does not exist. Where there is a trust, it should be considered in this Court as the real estate, between the *cestui que trust* and the trustee, and all claiming by or under them; and the trustee should take no beneficial interest that the *cestui que trust* can enjoy; but for my own part, I know no

instance where this Court ever permitted the creation of a trust to affect the right of a third person.' The argument of the two Equity judges who formed the majority of the Court was designed to show that at law there could be no escheat while there was a tenant *de jure*, that in equity there was none while trusts were called uses, and that trusts and uses were essentially the same. The doctrine of equitable escheat that it was attempted to set up, was disapproved of, and the case may be taken to have decided that where there was no escheat at law there could be none in equity.

No better illustration could be given of the feudal basis on which our land laws rest than this case of *Burgess* v. *Wheate*. No person with a shadow of a claim to the beneficial enjoyment of the property was in existence, and yet the Crown was not allowed to take as lord paramount for the technical reason that a legal tenant was found in the trustee. Lord Mansfield, indeed, attempted in a vigorous judgment to establish the right of the Crown by fixing on trusts the feudal incident of an escheat. Trusts in England, he argued, under the name of uses, began, as they did at Rome, under no other security than the trustee's faith, and it was not until Lord Nottingham held the great seal that they were placed on a true foundation. By steadily pursuing trusts from plain principles, and by some assistance from the legislature, a noble, rational and uniform system of law had been raised; trusts were made to answer the exigencies of families and all other purposes without producing one inconvenience, fraud, or private mischief which the Statute of Henry VIII meant to avoid. The *forum* where they were adjudged was the only difference between trusts and legal estates; *cestui que trust* was actually and absolutely seised of the freehold in consideration of a court of equity; and therefore the legal consequences of an actual seisin of a freehold should follow for the benefit of one in the *post*. This reasoning was said by the Lord Keeper to be very great and noble and very equitably intentioned, but it seems to be fairly open to his criticism that a decision on such grounds would be *jus dare*, not *jus dicere*. Lord Mansfield was upon firmer ground when he argued that the exclusion of the trustee from all benefit was surely in the contemplation of the parties; that it could never have been intended that he should hold to other purposes than on the trusts; and that the least analogy to any legal right ought to be preferred to the trustee, who was the mere form and instrument of conveyance.

Burgess v. *Wheate* has always remained the leading case upon this point of the law of escheat, though it can scarcely be said to have been a case of first impression. *Sir George Sand's case*, 2 Freem. 129,

decided (in 1669) that there was no escheat of lands on the attainder of *cestui que trust* for felony, for escheat was only *ob defectum tenentis*, and in this case the king or lord had his tenant as before, namely, the feoffee in trust, who was to be attendant for the services to the king or lord. This case was much relied on in *Burgess* v. *Wheate*, and was followed by the Court. Still, *Burgess* v. *Wheate* was elaborately argued as a question of principle, and the luminous judgments delivered by the three great lawyers who formed the Court will always be studied with profit by the student of legal history. The principle there established has been carried to a greater extent in some modern cases. *Henchman* v. *A. G.*, 3 M. and K. 485, was decided in 1834. A testator devised copyhold land in fee upon condition that the devisee should pay £2000 to testator's executor, to be applied, after payment of debts and legacies, to charitable purposes. The testator died without leaving any customary heir or next of kin. It was held by Lord Brougham that the proportion of the £2000, which was void by the Mortmain Act, was to be considered as real estate undisposed of, and that the devisee, and not the Crown, was entitled to it. Whether this decision was correct or not may be open to doubt, but there is no question that the judgment was couched in singularly infelicitous terms, and some reference will shortly be made to it. In 1844 the case of *Taylor* v. *Haygarth*, 14 Sim. 8, came before Shadwell, V. C. A testatrix devised real estate to trustees *in trust to sell the same immediately after her death*, and to stand possessed of the proceeds in trust for such persons as she should direct by a codicil. She made no codicil, and died without leaving any heir. After her death the trustees sold the real estate, and it was held that they were entitled to the proceeds for their own benefit. The principle was applied in 1853 to the case of a mortgage in *Beale* v. *Symonds*, 16 Beav. 406. In that case Lord Romilly, M. R., held that where a person made a mortgage in fee and died intestate and without heirs, the equity of redemption did not escheat to the Crown, but belonged to the mortgagee, subject to the mortgagor's debts. It is to be remarked that the three cases last cited go further than *Burgess* v. *Wheate*, and state in terms that the devisee, the trustee or the mortgagee was *entitled* to the land, that it belonged to him. The distinction is not a mere refinement of expression, and might have been of considerable importance had the Intestates Estates Act, 1884, not been passed.

But although *Burgess* v. *Wheate* has been often followed, its authority was long considered doubtful by the profession, and was never definitely established. The great weight of Lord Mansfield's authority was against it from the beginning. The claim of the

Crown, it is to be noted, was based solely upon the feudal incident of escheat. 'A better ground in favour of the claim of the Crown might perhaps have been found, by resorting to its acknowledged prerogative of being entitled to the *bona vacantia*, or every species of property of which no owner is discoverable' (Mr. Butler's note, Co. Litt. 191 a). The case of *Middleton* v. *Spicer*, 1 Bro. Ch. Rep. 201 (1783) was upon the claim of the Crown to all property to which there is no other claimant. The king, argued the Attorney-General (Lord Loughborough), is owner of everything which has no other owner. In that case, a man died possessed of leasehold property which he ordered to be sold and the money paid to a charity. The statute of Mortmain prevented the charity from taking. A legacy was given to the executor, and there were no next of kin. It was held that the executor was a trustee for the Crown. It is true that the estate in this case was personal property, and that a distinction may be made on that ground. But Lord Thurlow in his judgment said he did not see how the case was distinguishable in principle from *Burgess* v. *Wheate*. Where there was a trustee the general rule of the Court was that he could have no other title. The argument of the defect of a tenant seemed to be a scanty one. The executor having a legacy bequeathed to him and being clearly a trustee, could not, *by any possibility*, take any beneficial interest. In *Viscount Downe* v. *Morris*, 3 Hare 394 (1844), the lord of a manor taking by escheat, on the death of a tenant without heirs, the fee simple of lands holden of the manor, but subject to a demise by way of mortgage for a term of years created by the tenant, was held entitled in equity as against the mortgagee to redeem the term. In a careful judgment, Wigram, V. C., contested the proposition that a *subpoena* would in no case lie for the lord by escheat in assertion of a mere equitable title; or, in other words, that the Court could only have regard to the dry legal rights of the parties. 'It is one thing,' said the Vice-Chancellor, 'to say that where the tenant has aliened his whole estate at law and thereby ceased to be tenant, there shall be no escheat on his death without heirs; and another to say that the lord, taking lands by escheat, is bound by an alienation of the tenant for a term of years further or otherwise than the tenant himself was bound.' The doctrine that the Crown comes under no head of equity, and that it cannot enforce any equitable right whatever, was also condemned by Lord Romilly, M.R., in *Barrow* v. *Wadkin*, 24 Beav. 1 (1857), where it was decided that a trust of real estate created in favour of an alien, would be enforced for the benefit of the Crown. The devise being valid, and there being a *cestui que trust* who could take but not hold, the Crown became entitled beneficially, and not the trustee

or heir at law. It is true that in cases of alienage the Crown took by prerogative, and the feudal rules applied to escheats had no application, but all the cases on escheat were reviewed by the Master of the Rolls, who criticised *Burgess* v. *Wheate* unfavourably, though he had followed it four years before in *Beale* v. *Symonds*. 'The question there decided,' said he, 'may possibly be considered as not finally concluded, if it should ever come again to be considered.' Adverting to the want of title in the trustee, Lord Romilly said that, as it seemed there was no one having any right to the land, it would be difficult to hold that the Crown would not be entitled to take it as a vacant possession. Cases were enumerated in which the right of the Crown to enforce a trust of personal estate had been established, and the learned judge expressed himself unable to comprehend any distinction between such cases and the case of a trust of land. It is known that the late Sir George Jessel entertained an opinion that *Burgess* v. *Wheate* was not rightly decided, and in *Sharp* v. *St. Saveur*, 7 Ch. App. 352, he stated in argument that that case, if necessary, might well be questioned. In an opinion written when at the bar in 1872, the late Master of the Rolls said :—'I have long considered that on principle the Crown was entitled to equitable estates as *bona vacantia*. *Burgess* v. *Wheate* has been long followed as if it decided that the Crown had no title at all, although the only point really discussed and decided by the judgment was that the Crown had no title by escheat.' In a case already referred to (*Henchman* v. *A. G.*), Lord Brougham dismissed almost without consideration the argument that the Crown could take real estate by prerogative, as distinct from escheat. 'The Crown has no such prerogative; it may take personalty as *bona vacantia*, but real estate it can never take unless by escheat. Such a prerogative is contrary to the plainest and most fundamental principles governing English tenures.' The learned Chancellor appears to have entirely overlooked the case of alienage in which the Crown constantly took real estate by prerogative, and also the king's undoubted prerogative as universal occupant, by virtue of which he is entitled to all derelict lands. See *Exp. Lord Gwydir and another*, 4 Madd. 281. The contention that *bona vacantia* were matters of a purely personal nature was also advanced in argument in *Taylor* v. *Haygarth*.

After a struggling existence of a century and a quarter, the principle of *Burgess* v. *Wheate* was reversed by statutory enactment in 1884. Section 4 of the Intestates Estates Act, as already mentioned, applies the law of escheat to incorporeal hereditaments and to equitable estates in corporeal hereditaments. The section is not retrospective, and the old law will therefore continue to be of

importance for some time to come. It is submitted that this is for many reasons an unsatisfactory mode of settling the question. The difficulty of applying the feudal incident of escheat to things not lying in tenure has been already noticed. Then there was no reason why the mesne lord should have the equitable interest of an heirless man any more than the trustee. It would have been a better course, on the contrary, to apply to equitable as well as to legal estates the recommendation of the Real Property Commissioners (Third Report, 1832), that in all cases on failure of heirs and devisees, land of freehold tenure, unless where a quit-rent was actually payable to some person as immediate lord, should escheat to the Crown. The loss of the contingent benefit, it was said, could not be felt by any intermediate lord, the chance being so remote that it did not admit of being valued. But, it is submitted, the true solution of the question is entirely independent of the law of escheat, and is to be sought in a judicious extension of the prerogatives of the Crown. What was wanted was an Act giving validity to the proposition that the Crown is entitled to all property, real as well as personal, and whether the estate or interest is legal or equitable, that may be without any capable owner, whether there is or not any person in possession, by claim of right or otherwise. Where the possession is vacant there is no doubt the Crown is entitled. By the common law, it is said (Gilb. Exch. 110), where lands belong to nobody, the king's officers may enter, because by the law the land is in the Crown: for the law entitles him [the king] where the property is in no man.

Where a person seised of lands in fee dies intestate and without heirs, and no mesne lord is proved to exist, the right of escheat at once accrues to the Crown, and the title and possession are cast upon the king at common law. Notwithstanding the doubts expressed by Lord Ellenborough (12 East, 109, 110), it is believed to be the better opinion that an inquest of office is only a proceeding to ascertain the title of the Crown by escheat, and not an essential condition to the vesting of such title, 'or else the freehold should be in suspense, which may not be' (Staunf. Prerog. 54 a). But the law vests in the king nothing more than a bare right, and no beneficial enjoyment of the property can in general be had until after office found. It is laid down that the king's title must appear of record: 'and this was a part of the liberty of England that the king's officers might not enter upon other men's possessions, till the jury had found the king's title' (Gilb. Exch. 109). In all cases where a common person cannot have a possession, neither in deed nor in law, without an entry, the king cannot have it without an office or other record. This principle, it is believed, is not affected

by 22 & 23 Vict. c. 21, s. 25, which relates to rights of *re*-entry, though the contrary is stated in 3 St. Com. 694, 10th ed. When the limits of the prerogative were much less accurately defined than they now are, the interposition of such a barrier between the subject and the Crown may well have been necessary. It had become the practice of the Crown, in very early times, to make grants of escheated and forfeited lands, sometimes before office found, and at other times before returning the inquisition into Chancery or the Exchequer. By this means any true owner of the land was deprived of the opportunity of contesting the title of the Crown. Two statutes were passed to remedy this grievance, 8 Hen. VI. c. 16 and 18 Hen. VI. c. 6, by the first of which it was enacted that the Crown should not lease lands seised upon inquest before escheators or commissioners until a month after the return of the inquest, unless to persons tendering a traverse and disclosing a *prima facie* right. The second statute provided that no grant of such lands should be made by the king by Letters Patent (then the only mode of grant) until office found and returned, if the king's title were not of record; nor within the month after such return, unless to the traverser. The king's title may appear in some other shape of record, as in the case of his known tenants *in capite*, and an office is then unnecessary to enable the Crown to make a valid grant or lease. This case is probably not affected by section 2 (3) of the Escheat (Procedure) Act, 1887. But the instances in which the Crown may seise and dispose of lands without a previous finding of its title by inquisition, are believed to be very few, and in practice an office of Instruction would always be taken.

An inquisition or inquest of office is defined to be an inquiry made by the king's officer, his sheriff, coroner or escheator, *virtute officii* or by writ sent to him for that purpose, or by commissioners specially appointed, by means of a jury either consisting of twelve, or less or more, concerning any matter relating to the king's title to possession of lands or tenements, goods or chattels. Manning says (Exch. Prac. 87) that the jury must now consist of twelve. Since the practical abandonment of the prerogative relating to wreck and the almost entire abolition of forfeitures for offences, inquests of office have been seldom resorted to except in cases of alleged escheat of lands, though it is possible that it may still be necessary to resort to this procedure in a case of treasure trove, where difficulty is experienced in following or obtaining possession of the treasure. The procedure by inquisition was introduced by the Normans at the Conquest, and steadily superseded the old purely verbal procedure. It soon developed into the possessory and petitory actions of real property law, and contained the begin-

nings of the modern jury system. The procedure to entitle the king to some possession has continued to bear the original name, and still adheres closely to the original form. While military tenures were in existence, inquests of office were more frequently employed than at present; for upon the death of every of the king's tenants an inquest of office, called an *inquisitio post mortem*, was held, to inquire of what lands he died seised, who was his heir and of what age, in order to entitle the king to his marriage, relief, primer seisin or other feudal advantages, as well as to a possible escheat. There were two sorts of offices, one of *Intituling* and another of *Instruction*. The former issued in cases where an office is necessary to *entitle* the king, and the commission for taking it always issued out of Chancery under the great seal, as the king cannot take but by matter of record. Even where the king was entitled of record in some other way, an office was always taken before seisure, for the better instruction of the king's officer and in favour of the subject, that the king might not enter upon or seise any man's possessions upon bare surmises without the intervention of a jury. The office in this case was called an office of Instruction, and was taken by virtue of a writ issuing from the Court of Exchequer, or, where the lands were under the value of £5 per annum, the king's escheator might have held an inquisition of his own accord and *virtute officii*.

The effect of an office found for the king is to put him in immediate possession, without the trouble of a formal entry, provided the subject in a like case would have had a right to enter. If the possession were not vacant at the time of the office found, the king must enter or seise by his officer before the possession in deed shall be judged in him. It is a general rule that in all cases where a common person cannot enter, but is driven to his action, there the king cannot have the possession but by like action, or by *scire facias*, or information of intrusion. After office found the king is entitled to receive all the mesne or intermediate profits of the land from the time his title accrued. In the interval between the death of the last owner and the establishment of a title by escheat, the property is not under the control of any one. There is no authority in the Crown or any other claimant to receive or distrain for the rents, to admit new tenants or to eject squatters upon the land. The result is that the mesne profits are often lost. This inconvenience might well be obviated by giving to the Crown's nominee the powers of an interim curator. No claimant of the property would object to the adoption of this course, as it would be to the manifest benefit of all that a responsible official should receive the income of the land, on account of the person whose title should be eventually

established. An arrangement of this nature might probably be dealt with, as a matter of procedure, under the power to make rules given by the Escheat (Procedure) Act, 1887.

If the office be found against the king, a *melius inquirendum*, as already mentioned, may be awarded. But in good discretion this should not be done without sight of some record, or other pregnant matter for the king, to show the former office was mistaken. If the *melius inquirendum* be found against the king he is thereby precluded from having another *melius inquirendum*. Where the office is found for the king, any person aggrieved may present a petition to the Court for leave to traverse the inquisition, accompanied by an affidavit showing the grounds of the traverse. Should the facts set forth in the affidavit show a *prima facie* title in the claimant, leave will not be refused. The claimant then delivers his traverse in which he sets forth the grounds of his own title, and prays that the inquisition may be quashed and the king's hands amoved from the lands. The claim of the traverser will usually be either as heir at law of the last tenant, or as a mesne lord or other person entitled to the immediate seignory of the lands. The next step in the proceedings will probably be a summons taken out by the Attorney-General for the delivery of particulars of the title of the traverser. A replication is then delivered on behalf of the Attorney-General, and the pleadings are usually closed by a rejoinder from the traverser. The case is then set down for trial in the ordinary way. It will often happen that the matters in dispute are questions of law only, and in such an event a special case is the most convenient mode of dealing with them. If the Attorney-General is of opinion that the traverser has made out his case on the pleadings, he will usually deliver a confession of the traverse, so as to save the traverser unnecessary trouble and expense. Where the traverser succeeds, judgment will be entered that the inquisition be quashed and that the king's hands from the possession of the premises be amoved, and that the traverser be restored to the possession, together with the rents and profits from the time of the taking of the inquisition and in the meantime received. This judgment of *amoveas manus* will not, however, entitle the traverser to the mesne profits actually paid over for the king's use under the inquisition. 'The money being once in the king's coffers shall not be restored,' 2 Inst. 572.

Escheators were officers of the king whose duties were generally to ascertain what escheats had taken place, and to prosecute the claim of the sovereign for the purpose of recovering escheated property. The sheriffs often undertook the office of escheator in their counties, and after the appointment of separate escheators

the sheriffs long accounted for the smaller escheats. When escheats came to the Crown, it seems that the Justices Itinerant took care within their several circuits to have them seised for the Crown and put in charge to sheriffs or other officers for the king's profit. Towards the end of the reign of Henry II the practice arose of grouping several counties together as an *Escheatry*, and the Escheatries were managed by officers called at first *Custodes Escaetarum* or *Escaetriae* and afterwards *Escheatours*. The Escheatries seem to have varied greatly in importance and extent, consisting at different periods of two, three, or four counties. This mode of division existed certainly down to the end of the reign of Henry VIII, but in an intermittent fashion, for by the commencement of the reign of Edward I, we find but two Escheators in England, one on this side of Trent and the other beyond Trent, though sub-escheators were also employed. Lord Coke says that in the reign of Edward II the offices were divided, several escheators made in every county, and so continued until the reign of Edward III. And afterwards by the statute 14 Edw. III. st. 1, c. 8, it was enacted that there should be as many escheators assigned as when Edward III came to the Crown, and that was one in every county. But this statement seems scarcely accurate, for an escheator beyond Trent certainly existed in the ninth year of Edward II and in the sixth year of Edward III. The truth perhaps was that the rapacity of the escheators frequently gave rise to grievous complaints, and the king, in consequence, often varied the mode of their appointment and the extent of their jurisdiction. The escheators were the officers usually employed to take inquisitions for the king, but this seems to have been sometimes done by commissioners specially named for the purpose, and in many of the statutes on the subject, commencing with the Statute of Marlbridge, 52 Hen. III. c. 18, commissioners are named in the alternative with escheators. By the time of Elizabeth, the feudal system was in a state of incipient decay. Its technical phraseology was imperfectly understood, and the functions of its officers had become partially obsolete. By the middle of that Queen's reign the practice of issuing special commissions to five or six persons to take inquests of office seems to have been frequently adopted, one of such commissioners being sometimes the escheator for the county. The escheators were under the control of the Court of Wards and Liveries which was instituted by the statute 32 Hen. VIII. c. 46, for the superintendence and regulation of the king's revenue from feudal sources, and on the abolition of that Court by the famous statute 12 Car. II. c. 24, together with the oppressive tenures on which it was founded, the office of escheator became of

little use, and soon ceased to be filled up. No adequate provision was then made for the discovery of escheats, but when cases came to the knowledge of the king's officers, special commissions were issued for the taking of the inquest. This practice is in use at the present time, except where the procedure authorised by Section 5 or Section 6 of the Intestates Estates Act, 1884, which will be referred to subsequently, is put in force. When information sufficient to justify proceedings is obtained by the Solicitor to the Treasury, a commission issues, with the approval of the Law Officers of the Crown, directing inquiries whether the person whose estate is in question died without leaving any heir and without having devised his lands, when and where he died, what lands he had in the county at the time of his death and of what annual value, of whom the same lands were holden and by what services, who has received the mesne profits thereof since his death and to what amount, and in whose possession the said lands then are. (See *Doe* v. *Redfern*, 12 East, 97.)

Many statutory provisions were made from time to time to prevent abuses in the mode of taking inquests of office. Thus the Escheator was to hold his office only for a year, and was not eligible to serve again for three years; a property qualification was necessary both for him and for the jurors; inquests were to be taken 'of good people and lawful, which be sufficiently inherited and of good fame,' and of the same county where the inquiry should be; escheators were to sit in good towns, in convenient and open places and not privily, and to suffer every person to give evidence openly in their presence; a counterpart of the inquisition was to be delivered to the first person sworn of the jury, with him to remain to the intent that the Commissioner or Escheator may not change or 'enbesyll' the said offices or inquisitions; and elaborate provision was made to ensure that the offices found should be returned into the king's Courts without alteration. Where lands were situate in different counties, a separate inquest for each county must be taken.

Nothing has been said as to the procedure by which the title of a mesne lord or other private person entitled to the seignory of the land would be established. If the Crown made a claim, the mesne lord could of course appear at the holding of the inquisition, and the jury might then find in his favour. If the finding were in favour of the Crown, it might be traversed by the mesne lord. Should no action be taken by the Crown, it is conceived that the remedy of the mesne lord, since the abolition of the writ of escheat by 3 & 4 Will. IV. c. 27, s. 37, will be by an ordinary action to recover the land from the person in possession.

The jealous watchfulness against any extension of the right of the Crown to escheats, which once existed, has now in a great measure passed away, and the tendency of modern legislation is to enlarge the Crown's right. This change in public sentiment has been largely brought about by the practice which has obtained since the reign of George III of passing a Civil List Act on the accession of each sovereign, under which the hereditary casual revenues of the Crown are carried to the Consolidated Fund instead of to the privy purse of the sovereign. Acts, too, have been passed (39 & 40 Geo. III. c. 88, s. 12, and 59 Geo. III. c. 94) enabling the Crown, when entitled by escheat, to make grants of the escheated lands, for the purpose of restoring the same to any of the family of the person whose estates the same had been, or of carrying into effect any intended grant, conveyance or devise of any such person in relation thereto, or of rewarding any person or his family making discovery of any such escheat.

Sections 5 & 6 of the Intestates Estates Act, 1884, have introduced exceptions to the rule that the Crown's title must always appear of record. It frequently happens that the title of the Crown first becomes known in the course of an administration or other action, and in such a case, in order to save the cost of again finding the Crown's title in a formal manner, it is provided (47 & 48 Vict. c. 71, s. 5) that the Court may, with the consent of the Attorney-General, order a sale and direct the proceeds to be paid to a nominee of the Crown, notwithstanding that no office has been found and no commission issued or executed. A more serious inroad upon the old rule is made by section 6 of the same Act. Where an application is made for a waiver of the Crown's right to escheated lands by a person to whom a grant might be made under 59 Geo. III. c. 94, such waiver may be authorised by two lords of the Treasury, and the Treasury Solicitor may thereupon execute a conveyance of the land, which has the same effect as a grant from the Crown after office found. Any claimant may, however, on giving security, demand an inquisition within two years, and the right of traverse is fully reserved.

It is suggested that the time has now come for a more sweeping change still, and that proceedings by inquest of office to find the title of the Crown, might with advantage be entirely abolished. This procedure was established soon after the Conquest, when feudal tenures were in full vigour, and was appropriate enough where the question lay between a rapacious lord, anxious to press his rights to the full, and persons claiming under the tenant. It secured a certain publicity in the county, and the necessity for a verdict of a jury was a useful protection to the subject. The pro-

cedure by inquisition is now obsolete and ineffective. A precept from one of the special commissioners requires the sheriff to empanel a jury of twelve, and the proceedings take place in a room in the Town Hall or other public building of a town in the neighbourhood of the lands in question. Sometimes, when such a place cannot conveniently be made use of, the Court is held in a room of a hotel. Few persons attend besides those immediately concerned as jurors or witnesses, and the proceedings attract little notice from anyone. Occasionally, the local papers contain a short account of the matter. It is therefore clear that the procedure no longer effects many of the objects for which it was devised, and the question arises whether some simpler and more effective method might not now be adopted, and at the same time a very considerable saving of expense be brought about.

Even if, as rarely happens, some claimant appears and opposes the finding of the Crown's title, the cumbrous machinery of the inquest does not readily lend itself to his aid. If notice has previously been given to the Crown of any such claim, it will be investigated by the advisers of the Crown before the inquest is held, and if thought by them to be well founded, probably the proceedings would be entirely dropped, and no inquest would take place. Should the claim be considered not to have been made out, it can hardly be gone into with any care at the inquisition. Where no notice of any claim has been given to the Crown (and there is, of course, no obligation to do this) it is practically impossible to go into a complicated question of pedigree or of manorial rights without previous preparation involving the delivery of pleadings, so as to define the issues to be decided. It is therefore almost inevitable that in cases where claims are first put forward at the inquest, the jury should be directed by the commissioners to find the title of the Crown, and the claimant should be left to his remedy of traversing the inquisition, in which case the whole ground has to be gone over again. Inquests of office have accordingly become almost entirely formal, and are no longer of much service in bringing the matter to the notice of possible claimants. Where the lord takes by escheat on the death of any person other than a bastard, it is probable that his claim is admitted, not because there are no heirs, but because they are unaware of their rights, and the amount of publicity attaching to proceedings by inquest of office is not sufficient to bring the matter effectually to their notice. It is believed that there would be no objection on the part of the advisers of the Crown to any alteration in the practice of finding the Crown's title that would be better calculated to apprise unknown relations of their rights. The best

method of effecting this object, and at the same time of simplifying and cheapening the procedure in cases of escheat, that occurs to the writer, would be the institution of an action in one of the ordinary tribunals, for a declaration of the title of the Crown, or the mesne lord or other private person entitled to the escheated property. The Court might be empowered to make such a declaration on the expiration of a limited time after the insertion in the public newspapers of a statement setting out the circumstances, and calling upon the heirs or other persons having any right to make their claims. A practice similar to the above has long been followed in cases where the Crown seeks a grant of administration of the personal estate of any one who has died intestate and without known kin, and has frequently been found to be the means of apprising next of kin of rights before unknown to them. It is believed that some such system might be extended to the escheat of real estate with the best results. If considered desirable that questions of fact arising on the pleadings in any case should still be tried in the county, provision may be made for this to be done at *nisi prius*. The machinery of the County Court might perhaps be employed in the taking of inquiries of this kind, whether with or without a limit to the jurisdiction based on the value of the property in question. By thus making use of existing judicial machinery, a considerable saving in cost would be effected. Under the present practice, the cost of finding the title of the Crown is never less than £60 or £70. In cases of difficulty it would amount to much more than this, and indeed in 1832 the cost of an ordinary *inquisitio post mortem* and subsequent grant was put at £300 (Third Report of R. P. Commissioners, Appendix, p. 10).

Other reasons in favour of some such changes as those now recommended might be given, but it is not the writer's object to do more in this place than offer suggestions for the consideration of the profession and of others interested in the amendment of the law. In the course of this article several amendments, both of the law and practice in cases of escheat, have been suggested, and though they can hardly be said to be of a pressing nature, yet it is believed that a revision of the whole subject, with a view to legislation, is desirable, for the improvement of the form, as well as the substance, of the law. If, as seems likely, codification, to be effected at all, must be done piecemeal for particular branches of law and by private enterprise, the law of escheat is recommended as a tempting subject for experiment.

FREDERIC W. HARDMAN.

ENGLISH AUTHORS AND AMERICAN COPYRIGHT.

AT last and after much hope deferred the British author appears to be on the verge of his Promised Land, and to be approaching the day when the vast body of readers in the United States of America who have hitherto paid him the compliment of reading his works shall pay him for the privilege not in compliments but in cash. A Bill which promises to bring about this desirable result passed the American Senate on May 10, by thirty-five votes to ten, and has been approved by the Judicial Committee of the House of Representatives. It also has the support of the Typographical Union, an organisation of American printers most powerful in lobbying and other occult arts; it is warmly approved by American authors; its rejection does not appear to promise sufficient party capital to make it worth while to offer up the measure on the altar of the Presidential election; and the President is certain to pass it, should it be submitted to him. All seems well; and we can hardly be accused of counting our legislative chicken before he is hatched, if we give a short account of what the Bill is, and what change it is making in the law; why the British author is rejoicing, and wherefore British printers and publishers are wringing their hands.

It is hardly necessary to say that no person not a citizen of the United States or resident therein has hitherto possessed any copyright for literary, dramatic, or artistic work in the United States. The American public have enjoyed all the leading English books without contributing anything to the real author of their enjoyment; and American authors have led even more miserable lives than authors are reputed to do, for they have had to compete with productions of their English brethren, sold at a price which left no margin for the remuneration of the author. Mark Twain is reported to have given up hope of earning his living by writing his own books, and to have sought it in publishing other people's. For publishers who have not to pay an author anything, who are freed even the trouble of making up an annual statement showing a balance to the author's debit, naturally may hope for profit.

And at first American publishers obtained it. But publishing in the United States has gone through a curious evolution, which seemed likely to end at one time in its financial ruin. At first all English literature lay open to all American publishers, and, like the busy bee, they flitted from author to author, publishing his successful works for his fame and their own profit. But while a publisher

saw no objection to printing an English work without paying its author, it was obviously inconvenient when the same idea occurred to a brother publisher and there were two Richmonds in the field, two cheap editions in the market. Hence wars and rumours of wars, competing editions and cutting down of prices, to the public benefit and the publisher's loss. 'A state of nature was a state of war.'

From this state of war came, as according to Hobbes it should have come, a social contract. The ingenious publisher invented a copyright which had the advantage of protecting his publication, while it was free from the disadvantage of requiring any payment to the author of the work published. It was called 'the courtesy of the trade,' and consisted in an 'honourable understanding' (honour, we know, exists in the most unlikely regions), by which the first publisher of an English work in the States was protected from competition by his more tardy brethren. The early publisher picked up the worm of a courtesy copyright. Under this system English authors obtained some slight advantage, for as it was of importance to be first in the field in the States, 'advance-sheets' of the English work became a profitable investment for the American publisher, and in some cases considerable sums were paid for them.

This happy time did not last long; there arose a race of publishers in the United States who had no 'courtesy,' and who did not see the beauty of 'honourable understandings.' And in the form of Riverside and Lakeside Libraries, and other attractive titles, they published everybody's books right and left, paying no heed to priority of publication or to the competing editions of their rivals. Such was the internecine war waged between publishing firms that most books in the United States appeared to be sold at a loss, the publishers saying, like the old French lady, *Je me sauve sur la quantité.* This course of universal revenge was likely to end in universal ruin, and hence publishers gladly welcomed a prospect by which every man could sit under his own literary vine and fig-tree, no competing edition making him afraid.

American authors had long been of the same opinion; for it was all but impossible for a man in America to live by literature alone in face of the competition from English works produced at enormous advantage which his poor books must struggle against.

One formidable interest remained to be conciliated. The printers feared that if copyright could be acquired by English authors, the American demand for English works would be supplied by English editions, and the cheap employment of American printers, the setting up English works from the printed works themselves, would be gone. And they were able to gild this private interest with the attractive

covering of a desire for the public weal, pointing out to the American public, which is used to and likes its books cheap, that a monopoly to English editions would mean an enormous increase in price, and the adoption of the fictitious values induced by the English circulating library. And indeed the prospect of the importation of the English three-volume novel nominally published at one guinea and a half might well rank with Chinese immigration as a national evil. From these motives and with these arguments, the Typographical Union was powerful enough to slay all legislation.

One proposal to meet the difficulty was a royalty system by which any publisher might produce an English work on paying a certain royalty to the author, and a curious system of stamps was devised to carry out this arrangement. But though this gave the author his reward, it gave the publisher no security from competing editions, and as it aroused no enthusiasm in anybody, it failed to achieve any success.

Another suggestion, more fortunate, is embodied in the present Bill. If it becomes law any English author can obtain copyright for a book of his in the United States, provided that before publication of such work anywhere he shall deliver two copies of such book to the Librarian of Congress at Washington, *and such copies must be printed from type set within the limits of the United States.* If he does not do this before publication in England or elsewhere, he can obtain no copyright in the United States. If he does do this, his authorised edition will be protected in the United States from competition, and can obtain therefore a monopoly price. The words in italics, which constitute the gist of the whole measure, are of course the sop to the American printers. Under that clause, any book for which there is a considerable demand in the United States can be printed by them either as pirates, or under the sanction of the author; books for which there is no considerable demand they do not want to print. Their interests are further safeguarded by a clause protecting the American copyright edition from the competition even of an English copyright edition; so that briefly the American demand for books must be supplied by American printers, if they wish to supply it, and if that is done the American printer is willing to pay the English author in return for a monopoly of printing his work.

How will this affect English authors? In the first place, it will only assist those writers the success of whose books is so probable that they can afford to arrange for an American edition in making their plans for first publication. Works of an unknown author, which spring into celebrity by leaps and bounds, will probably reap no benefit from the new Bill, unless their author is sufficiently

confident and daring, their publisher sufficiently discerning and adventurous, to risk an English as well as an American edition. It is very doubtful whether the authors of John Inglesant, Robert Elsmere, King Solomon's Mines, Vice Versa, and other works of wide circulation, would have reaped from those works any benefit from their American sale under the new Bill, though second works by these authors could obtain protection in the American market, together with the additional price that their former successes would obtain for them. To the successful English author the Bill will probably bring increased fruits of success; to the obscure author, it is valueless. That class of writers for whose works there is a small but genuine demand in the States, so small that they are not worth pirating, but so genuine as to send orders to England, will not be affected in any way by the Bill. On the whole, therefore, the British author gets some benefit, and loses nothing by the Bill; indeed, he had nothing to lose.

The English publisher however may be very seriously affected, and has already raised a wail of despair. It is not merely that he is cut off from the American market; he had no substantial hold on it before, and he has not even the privilege of sending over his stereotype plates for the American edition, for the work must be set up in type in the States. But he may lose the English market as well. To get American copyright, the author must begin with an edition of American manufacture; but there is no corresponding restriction on his English copyright; why then, he may ask himself, should he print a second edition in England? He has only to print a larger number of copies of the American edition and import them into England, which at the present rate of American freights is not expensive, and he has saved all the expense of a second printing and publishing, and has only the English distribution to see to. And as the English author is not disposed to sacrifice himself on the altar of the English publisher to any greater extent than is necessary, this system of American manufacture seems likely to become prevalent among successful English authors, and English printers and publishers are correspondingly depressed.

The English author is to a certain extent the master of this situation. Strongly prejudiced as he is in favour of Lord Byron's celebrated emendation, 'Now Barabbas was a publisher,' he is hardly likely to go out of his way to assist his suffering but publishing countryman. The remedy lies with publishers themselves; they must make it worth while for English authors to publish in England. They must revise their iniquitous 'half-profits system,' so called because the publisher gets about two-thirds of the profits; they must overhaul their system of discounts and allowances, and

trade copies and accounts; and they must treat their author as a genuine partner in the joint adventure.

To the English author, the American Copyright Bill brings nothing but profit, though it might be more heavily laden with that good thing; and he may well be thankful to American authors, and to some few enlightening American publishing firms, to whose exertions it is chiefly owing that the Bill seems so near its haven as a part of the Code of the United States.

T. E. Scrutton.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

We are compelled by the pressure of leading articles on our space to postpone till the October number the publication of several reviews of books.

A Compendium of the Law of Torts specially adapted for the use of students. By HUGH FRASER. London: Reeves & Turner. 1888. Sm. 8vo. xviii and 144 pp.

THIS book is the analysis of a course of lectures delivered for the Liverpool Board of Legal Studies. In the main it is a clear and sound summary, and we are glad to see that the author strongly warns his readers against attempting to use it as a cram-book, and recommends them to study the law in the cases—the only method of attaining real knowledge. We make a few critical notes in the hope that they may at the proper time help to make a useful manual more useful.

In the matter of general arrangement it is tempting to put 'Liability for the wrongs of others' towards the end, on account of the difficulties attending parts of the topic. But liability for the acts and defaults of servants is assumed and exemplified in a large proportion of the cases on every branch of the law of torts; therefore, if the discussion of it is postponed, there should be some preliminary general statement. As to wrongs to property, Mr. Fraser might perhaps have given more clearness and weight to the fundamental distinction that trespass is essentially a wrong to an actual possessor, conversion a wrong to the 'true owner,' i. e. the person immediately entitled to possession. These two characters may and very often do coincide, but they also may not coincide and often do not. The complications arising from 'constructive possession,' i. e. from the extension of strictly possessory remedies in favour of owners out of possession but entitled to the immediate possession, should be introduced only when the leading principles have been grasped. In the definition of conversion as 'the removal of goods from the possession of another with the design of depriving that other of them,' etc., it seems to be implied that conversion always includes trespass, which is not the case. There is a smaller verbal slip in defining recaption as the right of a true owner to 'lawfully restrain [detain?] and take' his goods: it is of course the act of retaking, not the right. Then Mr. Fraser has invented a quaint kind of property when under the head of slander he speaks incidentally of 'the present possession of an infectious or contagious disease.' We have known a learned friend essoin himself from keeping an appointment for a walk *quia seisitus fuit de uno valde magno frigore*, but we doubt if it was well pleaded. If colds, not to mention greater matters, were capable of asportation, the persons afflicted with the 'present possession' of them would be more than content

to wink at larceny. By the way, trespass *de bonis asportatis* is not co-extensive with trespass to goods, though Mr. Fraser seems to say it is. Breaking a window or scratching the panel of a carriage is a trespass but not an asportation. As for the things a sixteenth-century pleader in the Court of a Lord of Misrule might have made of Mr. Fraser's hint, we leave them to the reflections of the curious.

Our author approves the definition of libel in the draft Civil Code of New York. It chiefly shows to our mind that the maker of it did not understand the law of privileged communications. To define a libel as 'a false and unprivileged publication' is to ignore the reason why certain communications are said to be privileged. They are libellous in their nature, but specially justified; whereas a true statement, or a fair comment on matter of public interest, is not a libel at all, and does not need special justification. Defamation is much better defined in the Indian Penal Code, though not with the same ambition of elegance and generality. We are not quite satisfied with Mr. Fraser's explanation of so-called 'malice in law.' First, Lord Blackburn's exposition of the true doctrine in *Capital and Counties Bank* v. *Henty* is ample warrant for not using the term at all. Secondly, Mr. Fraser's gloss, 'the intention of doing a wrongful act without just cause or excuse,' is not unlikely to mislead beginners. He really means the intention of doing an act which in fact (whether the actor knows it or not) is the breach of a general legal duty; but the student may think he means the intention of doing an act which the actor knows to be wrongful. Mr. Fraser correctly states that this kind of malice is not enough to support an action for malicious prosecution. But we are surprised that he does not cite the latest and most authoritative exposition of this point, *Abrath* v. *N. E. R. Co.* in the Court of Appeal, where it is said by Bowen L. J. (11 Q. B. Div. at p. 455) that the plaintiff in such an action must prove that the defendant acted 'from an indirect and improper motive, and not in furtherance of justice.'

In the account of negligence we think that *Tuff* v. *Warman*, the leading case which chiefly put the doctrine of contributory negligence on its true footing, ought to have been more prominent. And it is quite incorrect to suppose, as Mr. Fraser apparently does, that the rule in *Rylands* v. *Fletcher* is generally accepted in America.

There are various points of detail and language which call for correction or revision. Distress damage feasant, for example, is not limited to cattle; and careful examination of the report of *Bird* v. *Holbrook* will show that the cause was tried before, though the decision of the full Court was given after, the passing of the Act against setting spring-guns. In this last point, however, Mr. Fraser has erred in company with a recent book which he not unfrequently refers to, and which may have misled him even with the report before him.

Finally, it seems at least open to doubt whether textual quotations from books not of authority should ever be introduced in elementary works. The difference between that which is of authority and that which is not cannot be too soon or too emphatically impressed on students; and if they are encouraged or allowed to take definitions and rules of law ready-made from text-books, instead of regarding them as material for critical comparison with the authorities, they will scarcely be brought to form accurate habits of work.

F. P.

A Treatise upon the Law of Extradition, with the Conventions upon the subject existing between England and Foreign Nations, and the cases decided thereon. By Sir Edward Clarke, Knt., H. M. Solicitor-General: formerly Tancred Student of Lincoln's Inn. Third Edition. London: Stevens & Haynes. 1888. 8vo. xx, 226 and cclxx pp.

The production of legal text-books is the outcome, as a rule, of very different gifts of nature and fortune from those which lead to the highest honours of the profession. The work before us is, however, a third edition, and on its first appearance, in 1866, the marvel was not that Mr. Clarke had found time to write it, but that so young a man had already been engaged in several extradition cases of first-rate importance. At that date the subject had attracted little attention in this country, but thanks to the labours of the Select Committee of 1868, its principles became better understood, and the law regulating their application assumed a permanent form in the admirable Act of 1870. The effects of this change were fully explained by Mr. Clarke in his edition of 1874. His third edition has to record no similar progress, since, from causes not far to seek, the valuable recommendations of the Royal Commission of 1878 have not as yet been embodied in an Act of Parliament; but Treaty-making has been active in the mean time, and a good many cases have been decided by the Courts. The author, with the assistance, as he gratefully acknowledges, of two former pupils, has worked in the results of the recent cases, and sets out textually, in an appendix occupying half the volume, all the extradition treaties to which Great Britain is a party. The least valuable chapter of the work is probably that in which Sir Edward Clarke supports by the authority of a certain number of jurists the proposition that Extradition is obligatory apart from Treaty, while admitting that the duty for which he contends is one rather of 'public morality' than of International law. The current of judicial decisions and of modern diplomatic controversies is on such a subject of more value than many citations from Grotius or Burlamaqui. The theory and the history of extradition have been discussed within the last ten years on the Continent with vast erudition, and with a minuteness of detail of which some idea may be gained by a glance at the list of authorities cited in the treatise of Dr. Lammasch, which we had occasion to notice a year ago [1]. In such enquiries Sir Edward Clarke's book will naturally carry us but a short way. Its merits are of a different order, and such as might be expected from a singularly clear-sighted observer of a system with the working of which he has been much and closely concerned. Chapters VII and VIII are especially useful and interesting. The former contains a succinct account of the practice in extradition of France, England, the United States, and the Dominion of Canada. In the latter, the Solicitor-General sums up the conclusions at which he has arrived with reference to the present state of English law upon the subject. He disapproves of several of the provisions of the Act of 1873, and severely criticises the two recent cases of *R.* v. *Ganz* and *R.* v. *Nillins*. The last mentioned case was certainly somewhat startling. Nillins, while resident in Southampton, sent by post certain forged bills of exchange to persons in Germany, and was surrendered to Germany for this offence.

The work remains, as it was on its first appearance, the only text-book upon the law of extradition as practised by Great Britain, and it is not likely soon to be superseded. T. E. H.

[1] L. Q. R., III. p. 229.

Inebriety, its etiology, pathology, treatment and jurisprudence. By Norman Kerr, M.D. London: H. K. Lewis. 1888. 8vo. xxx and 415 pp.

This treatise is able, learned, and in the main moderate. Dr. Kerr's argument, in so far as it bears upon the medico-legal branch of his subject, may be summarised thus. Inebriety is a constitutional disease of the nervous system, characterised by a very strong morbid impulse to, or crave for, intoxication. Occasional, or even repeated, cases of drunkenness are only evidentiary symptoms of inebriety; they do not constitute it. Nor does this disease essentially depend upon the particular intoxicant to which an inebriate is addicted. That may be absinthe, cocaine, opium, alcohol, or any one of a hundred other stimulants. Dr. Kerr next shows that there is a close analogy, if not an actual historical relationship, between inebriety and insanity, and that the former disease, like the latter, may be roused into fatal activity by a single act of indulgence, or by circumstances over which the patient may or may not have control. It becomes necessary, therefore, to determine the effect of inebriety—upon civil capacity and criminal responsibility. And now our author reaches the point at which the lawyer and the doctor have hitherto parted company not without dust and heat. But Dr. Kerr, while he is too thorough an alienist not to give an occasional overcolouring to his facts, is at the same time too much of a logician to draw extreme conclusions. And his apparent contentions, which it may suffice to state without detailed criticism, are these:—

1. That no *uncured* inebriate should be permitted to marry.

2. That law should recognise inebriety itself as a disease which may modify and in some cases cancel criminal responsibility.

3. That the allowance of the plea of inebriety in any given instance should be determined by a medico-legal tribunal—an aspiration which might perhaps be realised by extending to criminal cases the power of summoning assessors which the judges possess under the Judicature Acts in civil proceedings.

4. That the Habitual Drunkards Act, 1879, should be replaced by a permanent measure providing, after the American and Colonial models, for the maintenance of pauper or poor inebriates at the public charge, and for the magisterial committal of habitual drunkards to licensed retreats.

A. W. R.

A Concise Treatise on the Law of Covenants. By G. Baldwin Hamilton. London: Stevens & Sons. 1888. 8vo. xxiv and 165 pp.

We took this book in hand with some misgivings, as the author was called only in 1886, but we were agreeably disappointed, and we think that it will be found useful. The book contains some original research, but it is of very unequal merit. Perhaps the best parts are the first chapter 'What is a covenant and how created,' and the discussion at pp. 102 et seq. of the difficult questions relating to covenants running with land in cases where they are not annexed to a reversion, which is decidedly good. The appendix contains an interesting account of the old action of covenant.

The author is able to write good English when he likes; we therefore have a right to complain that in many cases he does not take the trouble to do so. *Ex. gr.* on p. 42, 'In an assignment of a lease as beneficial owner,' 'In mortgages the same covenants are implied,' there being no antecedent to which the word 'same' applies. This carelessness of diction is very apparent in the discussion of joint and several covenants, where in places it almost amounts to an inaccurate statement of the law.

It is very difficult to write on law without making mistakes; a somewhat painful experience has taught us that the best manner of avoiding them is to have both the MSS. and the proofs read by a competent critic, and to alter every passage to which he objects, however unreasonable his objection may appear. But even if this is done some blunders will remain, blunders of which one is horribly ashamed. If it was not an ungracious task one could write an amusing article consisting of the astounding blunders committed by eminent legal writers. We hope therefore that Mr. Hamilton will take our criticisms in good part; his book is full of promise, and we venture to predict that if he will bestow more of the labour of the file on his next book it will be successful. H. W. E.

A Treatise on the Law of Partnership. Fifth Edition. By Lord Justice Lindley, assisted by William C. Gull and Walter B. Lindley. London: W. Maxwell & Son. 1888. La. 8vo. lx and 844 pp.

The fifth edition of 'Lindley on Partnership' has taken a new departure. With a view to convenience and expense, the familiar treatise has been divided into two parts, each complete without the other. The first volume is now in our hands, containing the law of partnership proper, and the second, which is promised shortly, will deal with the law of companies so far as it has any connexion with the law of partnership. To our mind this division of subjects is a distinct improvement. It saves the practitioner from the petty annoyance of taking down the volume containing an index, only to find that the point which he seeks is discussed in the other volume. Now he will know at once which volume it is that he needs, the partnership volume or the company volume. Besides the immense development of company law, which will in its relation to partnership be discussed in the forthcoming volume, there have been several important decisions, though no legislative change, in the ten years which have elapsed since the publication of the fourth edition of this work. There have been notably the cases of *Kendall* v. *Hamilton*, *Scarf* v. *Jardine*, and *The Yorkshire Banking Company* v. *Beatson*. The second of these, which is well known for its important bearing on the liability of a retiring partner for the debts of the firm, is referred to no less than eleven times in the volume before us, and twice with particularity of the circumstances. It is an ingenious device and, so far as we are aware, one peculiar to the writer, to give in the list of authorities cited an asterisk to the page on which a case is considered in detail, and not merely quoted in a note. The author and his assistants expressly disclaim any attempt to cope with the authorities since 1866 extraneous to the Law Reports. Those authorities are the bugbear of the busy lawyer. It is by no means easy for him to assure himself that the point upon which he is engaged has not been directly decided in one of the three or four contemporary and equally authoritative reports, and generally he runs the risk of being confronted with such an authority by his opponent. So that it is a great assistance to him to have these foreign cases collected and analysed for him by a text writer such as the Lord Justice. We are disposed, while we are on small things, to complain of the number of additions and corrections, which is for a fifth edition abnormal, and takes a full forty minutes to incorporate in the text. In other small things the industry of Lord Justice Lindley's assistants is not at fault. For the corpus of the work, that has been well tried in the furnace of daily practice, and it has stood the severest test. It is the monograph on the subject which lives in legal libraries as an indispensable assistant. It has lived long, and this latest edition is in no respect unworthy of its predecessors. Even now however there are occasionally

to be found sentences which would bear elucidation, such for instance as that on p. 21: 'A contract of partnership is determinable at the will of any one of the persons who have entered into it, provided it has not been agreed that the contract shall endure for a specified time.' Is the ordinary contract by which two men engage to be partners so long as they both live a contract for a specified time? The answer to this question should be, we believe, in the affirmative, but it is an answer which it is hard to find in the pages before us. Taken however as a whole, the latest edition of 'Lindley on Partnership' deserves the same measure of praise and success as the unanimous judgment of the legal community has respectfully awarded to its predecessors.

Chitty's Index to all the Reported Cases decided in the several Courts of Equity in England, etc. The Fourth Edition. By HENRY EDWARD HIRST. Volume VI, containing the titles 'Packer' to 'Smuggling.' London: Stevens & Sons; H. Sweet & Sons; W. Maxwell & Son. 1888. La. 8vo. x and 5373–6369 pp.

YET another volume of Chitty's invaluable Equity Index has reached our hands, and it shows no falling off from its five predecessors as concerns the laborious accuracy which Mr. Hirst has bestowed upon it. The sixth volume contains such important titles as Partition, Partnership, Patent, Perpetuity, Petition of Right, Portion, Power, Principal and Agent, Railway, Registration, Revenue, Scotland, Set-off, Settled Estates Acts, Settlement, the Rule in Shelley's Case, and Shipping. By a curious coincidence the first title in the volume is 'Packer' and the last 'Smuggling,' just as the first title in one volume of 'Fisher's Digest' is 'Crops' and the last 'Hunting.' The succession of these volumes is fairly rapid. We noticed in our January number the fifth volume, and now in July we are enabled to notice the sixth. May next January see the invaluable seventh and last in our hands, for its index of cases will enable us to turn to any decision *nominatim*, instead of hunting for it, as at present, under its subject which may be dubious. But even on the assumption that by January 1889 birth be given to the final volume of Chitty, five years and a half will then have elapsed from the day when the first volume of the series saw the light. True it is that progress has been more rapid since Mr. Hirst has undertaken his task singlehanded, but there is no denying that there will be a formidable gap to be filled up between the end of 1883—the point up to which the Equity Index, save only the first two volumes, *εὔχεται εἶναι* complete and unimpeachable—and 1889, the year which will, we anticipate, see its last volume published. This gap means that there are so many volumes of law reports of every race, or so many annual digests, to be scanned by the practitioner before he can be assured that he has surveyed his point under consideration from one pole to the other. And the unpleasant fact must not be lost sight of, that by publishing the first volume before the year 1883 had expired, Mr. Hirst has exposed his editions to the charge of inconsistency, in that one volume contains cases up to a date different from that attained by the others. Nothing, however, is more transitory in its nature than a legal digest or text-book, and the time is very short during which a lawyer can look upon it as 'absolute in every number.' We can but hope that at least for the sake of the community whose hive is Lincoln's Inn, Mr. Hirst may undertake the task of editing the fifth edition of 'Chitty,' when in the fulness of time that edition is demanded.

Histoire du Droit et des Institutions de la France. Par E. Glasson. Tome II. Paris: F. Pichon. 1888.

In the first volume M. Glasson dealt with Celtic and Roman Gaul (see Law Quarterly Review, vol. iv. p. 100). The second volume is devoted (as will be the third) to the Franks. The present volume treats of their political and administrative organisation and of the condition of persons among them at a period when the differentiation of the peoples which were to spring from the common German stock had yet made little progress. We find here the beginnings of some of our own institutions, and even of some of our legal expressions, as in the case of *trustis*, though used in a very different sense (p. 600). (See also 'mansion,' p. 361.) The volume is preceded by an exhaustive methodical bibliography (33 pages) of literature relating to the period.

The Law and Practice on Enfranchisements and Commutations. By Archibald Brown. London: Butterworths. 1888. 8vo. xx and 456 pp.

The Copyhold Acts 1841–1887 form a series of seven Acts, creating a sufficient muddle to justify the epitome contained in this book. The epitome is divided into chapters treating separately of enfranchisements and commutations,—an arrangement which involves some lengthy repetitions. To these are prefaced a chapter on enfranchisements and commutations at common law; and the body of the work (consisting of 144 pages) concludes with a chapter of practical directions. There are the inevitable appendices, setting forth the seven Acts already mentioned, nine other Acts incidentally connected with the subject-matter, and a collection of precedents and official forms. The Act of 1887 is accompanied by some apt annotations. There is a full and well-arranged index; and the whole will be a useful handbook for stewards of manors and others who have much to do with these incidents of copyhold tenure.

The Justices' Note-book. By the late W. Knox Wigram, J.P. Fifth Edition, by Walter S. Shirley, M.P. London: Stevens & Sons. 1888. 8vo. xii and 527 pp.

The appearance in a fifth edition of (we note with regret) the *late* Mr. Wigram's excellent Note-book for Justices deserves mention here, although the work in an earlier edition has been reviewed in the Law Quarterly[1]. The text of the work is substantially unaltered; but recent decisions and legislation have been worked in. The arrangements, however, for dealing with the legislation of 1887 are not satisfactory. A number of extracts of these Acts are placed in an appendix, without being in any way worked into the text. The lateness of the last year's session may have made it difficult properly to incorporate this matter in a book published in December; but the difficulty ought to have been foreseen and remedied, at the cost (if necessary) of reprinting.

We may here repeat the opinion formerly expressed of the literary merits of Mr. Wigram's book. The style is clear, and the expression always forcible, and sometimes humorous. The book will repay perusal by many, besides those who, as justices, will find it an indispensable companion.

A Handbook of Written and Oral Pleading in the Sheriff Court (Scotland). By J. M. Lees, Sheriff Substitute of Lanarkshire. Glasgow: William Hodge & Co. 1888. 8vo. xxii and 232 pp.

Few judges have a more varied experience than a Sheriff Substitute—who

[1] July, 1885.

is in fact the acting Sheriff—in Lanarkshire. Besides having important functions, both administrative and judicial, in criminal matters, he is judge ordinary in a populous and actively commercial district, with a jurisdiction, in personal actions, unlimited in amount. From this point of view the author gives hints and directions to the practitioners in his own and similar courts, which, if well digested and attended to, will avoid the risk of miscarriage in a well-founded claim; and prevent many an ill-advised proceeding from being entered on. The directions are thoroughly practical and sound, and well adapted for the use of the class for whom they are written. The language is popular, and sufficiently free from technicalities to make the book interesting to the wider class of those who may wish to know how a system of subordinate local judicature, so successful as that existing in Scotland, is actually conducted.

Redress by Arbitration. A Digest of the Law relating to Arbitration and Awards. By H. Foulks Lynch. London: Effingham, Wilson & Co. 1888. vi and 86 pp.

This is an attempt to treat a subject popularly and scientifically. The combination is not one which is either desirable or satisfactory. A popular legal hand-book should be written in a purely popular manner. The scientific method when used popularly is apt to become ridiculous. For example, Article 3 begins thus: 'One arbitrator is better than two, because one is more likely to act judicially.' It is absurd to put a piece of information based on the experience of men of business into the form of a proposition of pure law. While therefore the layman will be able to pick up some information about arbitration in this book, Mr. Lynch would have saved himself trouble and have produced a better book if he had sat down and simply written out in ordinary form some hints about arbitration.

A Selection of Leading Cases in the Criminal Law. By Walter Shirley Shirley. London: Stevens & Sons. 1888. 8vo. xii and 147 pp.

This little book has a good deal in common with others by the late Mr. Shirley. While it shows no especial degree of learning, and makes no pretence to add to the stock of knowledge common to most barristers practising at sessions, it is reasonably lucid and not particularly inaccurate. Its worst fault is the endeavour to be amusing as well as instructive, which Mr. Shirley was accustomed to achieve by such means as saying 'Mr. Robert' when he had occasion to refer to a policeman, and marginally annotating a case of larceny 'a butcher-boy's little game.' So far as the book goes, it will not do students any great harm. They will not find in it either historical exposition of the law, or critical appreciation of the nice points of dogmatic speculation involved in such a case as *R.* v. *Ashwell*.

A Digest of the Law relating to the Sale of Goods. By Walter C. Ker. London: Reeves & Turner. 1888. 8vo. xvi and 137 pp.

This Digest is in the form of what has been in late years more usually styled a Code, following, to a certain extent, the method of the Indian Contract Act 1872, but with a variety of arrangement of matter and type that is rather perplexing.

Notwithstanding this defect of form, the book contains some good work; and will be an excellent guide to the salient and most recent authorities on the law of sale of goods; a subject which is continually growing, and developing new materials to be digested. The work done is sound, and

the results made readily accessible for practical use, both by condensation of the subject-matter, and by a good index.

The Complete Annual Digest of every Reported Case in all the Courts for the year 1887. Edited by ALFRED EMDEN, compiled by HERBERT THOMPSON. London: W. Clowes & Sons, Limited. 1888. La. 8vo. lxxxii and 492 cols.

WE are favoured with the last issue of this useful annual. So long as a variety of reports exist, it is a great satisfaction to have periodically an accessible arrangement of their contents which we are assured is exhaustive. The Table of Cases followed, overruled or commented on, Table of Statutes, and Table of Rules, give a ready clue to finding the latest authority, good or bad, upon any subject to which the primary reference, whether of statute or case law, is already known.

We have also received—

Principles of the English Law of Contract, and of Agency in its relation to Contract. By SIR WILLIAM R. ANSON, Bart. Fifth Edition. Oxford: Clarendon Press. 8vo. xxxi and 384 pp.

The Law relating to Actions for Malicious Prosecution. By HERBERT STEPHEN. London: Stevens & Sons. 1888. 8vo. xii and 131 pp.—Mr. Stephen thinks that the law may be said to have at last become what many judges have said or hinted that it ought to be; i. e. that the question of 'reasonable and probable cause' in cases of malicious prosecution and false imprisonment may, since the latest decisions, be frankly treated as a question of fact.

The Law relating to Dogs. By F. LUPTON. London: Stevens & Sons. 1888. 8vo. xii and 160 pp.—This little book will be found useful by country gentlemen and other owners of dogs; it seems to contain a sufficient account of the law of practical utility on the subject.

The Sources of the Law of England. By H. BRUNNER. Translated from the German by W. HASTIE. Edinburgh: T. & T. Clark. 1888. 8vo. x and 63 pp.

The United States and the States under the Constitution. By C. S. PATTERSON. Philadelphia, Pa.: T. & J. W. Johnson & Co. 1888. 8vo. xxxi and 290 pp.

The Madras Code, etc. Second Edition. Calcutta: Govt. Press. 1888. La. 8vo. xxix and 779 pp.

Istituzioni di diritto civile italiano. Per G. P. CHIRONI. Vol. I. Torino: Fratelli Bocca. La. 8vo. xi and 367 pp.

L'unificazione delle leggi Cambiarie nel Congresso Internazionale di diritto Commerciale in Anversa. By SHERIFF DOVE WILSON. Tr. by Avv. SALVATORE SACERDOTE. Turin. 1888. 17 pp.

The Coal Mines Regulation Act, 1887, etc. By MASKELL W. PEACE. London: Reeves & Turner. 1888. 8vo. xiv and 367 pp.

Will-Making made Safe and Easy. By ALMARIC RUMSEY. London: John Hogg. 1888. x and 140 pp.

Accidents de Travail. Par CH. SAINCTELETTE. Brussels: Bruylant-Christophe & Cie. 1888. 26 pp.

The Nature and Value of Jurisprudence, Roman Law and International Law. By CHAN-TOON. London: W. Clowes & Sons, Limited. 1888. 8vo. 31 pp.—A neat little summary showing only traces of the English language not being native to the writer. It looks as if it had been prepared for some special occasion, but there is not anything to show what.

NOTES.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

Note on the Canonists.

Few English lawyers know what works on the Canon Law are of authority, or the method of citing them. I put together the following notes for my own convenience, and I think that they may be useful to lawyers who are not civilians. I have added a short statement of the method adopted by the Canonists in citing the civil law.

Authorities on the Canon Law.—Various collections of Ecclesiastical law, called 'canones,' as distinguished from 'leges,' temporal laws, were made from time to time by private persons. The most celebrated of them was the 'Decretum' produced by the learned Gratian in the twelfth century, republished in 1582 by the orders of Pope Gregory XIII. In 1226 Pope Honorius III sent a compilation of Decretal Epistles to the university of Bologna, and directed that it should be taught and used both in the courts and schools of law. This compilation appears to have been superseded by an authentic collection called 'The Decretals,' published about 1234 under the authority of Pope Gregory IX, who directed that this collection alone was to be used in the courts and in the schools. See Hallam, Middle Ages, ii. 287. Another volume of Decretals was published in 1298 by Pope Boniface VIII. Other decretal epistles were published by subsequent Popes under the name of 'Extravagantes.' A book of Decretals by Matthaeus and four books of Institutes by Lancellottus have always been regarded as of great authority in the Canon law, though they have never received the Papal sanction. In England the Ecclesiastical Courts have also received as works of authority the 'Constitutions' of the legates Otho (1236) and Othobon (1268), the 'Glosses' of Joannes de Atho (about 1290), the 'Provincial Constitutions' of successive Archbishops of Canterbury from 1222 to 1417, all of which with the Glosses of Lyndewood (1423) are usually printed together and referred to under the name of Lyndewood. The 'Pupilla Oculi,' published in 1385 by John de Burgo, Chancellor of the University of Cambridge, is also considered an authority.

Manner of citing the Canonists.—The references to the authorities on Canon and Civil law are very complicated. It is possible that before the invention of printing it was not found safe to adopt the modern plan of referring wherever it is possible to numbers. The first part of the Decretum is referred to as *d. di.* or *dist.* [distinction], the second part as *q.* [quaestio], and the third part as *con.* [consecratio].

References to the first part of the Decretum take the form *dist.* 8 *quo jure* or 70 *dist. c.* 1 *& 2*, that is, the first part of the Decretum, the chapter beginning 'quo jure' in the 8th *distinctio*, and the first and second chapters in the 70th *distinctio* of the first book. The second book is referred to as

follows, 26 *q. nec mirum in v.* [or §] *magi*, which means the paragraph that begins *Magi* in the canon *nec mirum* in the fifth *quaestio* of the 26th *causa* of the second part of the Decretum. References to the 3rd *quaestio* of the 33rd *causa* of the second part of the Decretum sometimes take the form *de poena dis.* 1. *homicidiorum*, which means the canon commencing 'homicidiorum' in that *quaestio*.

The reference to the third part of the Decretum is made as follows, *de Con. dist. I. c. Ecclesia*, meaning the canon commencing *Ecclesia* in the first *distinctio* in the third part of the Decretum.

The Decretals are divided into five books, each book into titles, each title into chapters and paragraphs. The reference *de sum. Trin. et fi. Cat. damnamus* means the chapter *damnamus* in the title *de summa Trinitate et fide Catholica*; this may also be cited as *Extra de sum. Trin. et fi. Cat. c. damnamus*, where 'Extra' means 'Extra decretum Gratiani.' The seventh and eighth books are cited in a similar manner, adding at the end *lib.* 6 or *lib.* 7. The Clementine decretals are cited in like manner, prefixing 'Clemen.' or adding 'in Clemen.'

The Extravagantes are cited *de præb. et Dig. Extra. Joan. XXII* or *de major et obed. Extra. Com.*, the references being to the Extravagants of Pope John XXII or to the Extravagantes Communes.

Manner of citing the Civil law.—The Digests or Pandects are referred to by the letters *ff*. This abbreviation appears to have 'arisen by calligraphic development from a *d* with a line through it' (Roby, Introduction to the Study of Justinian's Digest, p. ccxlv, *q. v.* for further details). The titles and laws are referred to by their first words: thus *ff. de damno infecto, l. si finita* means the law beginning *si finita* in the title *de damno infecto* of the Digests. This may also be written *l. si finita, ff. de damno.* The more modern practice is to refer to the numbers of the book, title and law: thus the law cited above would be 'Dig. (or D.) XXXIX. Tit. II. l. 15,' or 'Dig. XXXIX. II. 15.' The Institutions are referred to as follows, *Instit. de nuptiis*, § *duorum*, which means the paragraph commencing *duorum* in the title commencing *de nuptiis*. This may also be referred to as 'Instit. I. Tit. X. § 4.' Many modern writers use the single letter I, thus: I. i. 10. § 4.

References to the Codex were made as follows: *Cod. de Feriis, l. omnes Judices*, meaning the law commencing 'Omnes judices' in the title *de feriis*. This would now be referred to as 'Cod. (or C.) III. Tit. XII. l. 3. Some writers, however, still put the law and paragraph before the book and title; and there is much variation in the use of Roman and Arabic figures and other *minutiae* (see Roby, l. c.).

References to the Authenticum, i. e. the old Latin version of the Novels of Justinian, are made as follows, *Authent. de nuptiis, cap. sed etiam, coll.* 4, meaning the chapter beginning 'Sed etiam' in the title 'de nuptiis' in the fourth Collatio of the Authenticum. This may be referred to as 'Aut. Col. IV. Tit. I. Nov. VII.'

References to the Liber Feudorum are made as follows, 'In Feud. quid sit Invest. § si vero,' or 'Feud. 2. Tit. 2. § 1.'

The old-fashioned citations without numbers can be traced by means of the indices with which all modern editions of the Corpus Juris are furnished.

H. W. E.

The note in the LAW QUARTERLY for April last (p. 236) upon Mr. Justice Kekewich's disapproval of 'the practice of citing as authorities the text-books of living authors, and particularly of authors on the bench under

the notion that these latter possess a quasi-judicial authority' recalls an incident at the argument of *Rodliff* v. *Dal'inger* (141 Mass. 1) before the full bench of the Supreme Court of Massachusetts, of which Mr. Justice Holmes is a member.

The question was whether the owner of goods, which had been delivered to an agent for a principal really fictitious, but represented to be existent although undisclosed, and which had been pledged by such agent as his own, could maintain replevin against the agent's bona fide pledgee. After a verdict for the plaintiffs the case came before the full bench upon the defendant's exceptions. These were argued at considerable length by the defendant's counsel, while the plaintiffs' counsel simply read to the Court the third paragraph of Lecture IX of Holmes's Common Law, (say) nine lines (see p. 308).

Despite, then, Lord Justice Fry's remark that 'it is hardly enough remembered how different are the circumstances under which a book is written and a judgment pronounced' (Specific Performance, 2nd ed. preface), it may be said that in this case the opinion of the Court written by Mr. Justice Holmes shows that the counsel for the plaintiff safely assumed that the circumstances under which 'The Common Law' was written and the judgment as to his clients was to be pronounced were far from different, and that 'a quasi-judicial authority' might properly be attributed to the text-book in question, although written before its author's elevation to the bench.

B. S. L.

Boston, Mass., 25 *May*, 1888.

[The relative weight of text-books, as compared with decisions, is no doubt much greater in the U. S. than here.—Ed.]

The Lunacy Acts Amendment Bill appropriately closes an intricate, yet thoroughly characteristic, chapter in the history of English law. After a struggle of nearly a century and a half's duration against the lukewarmness of a public opinion whose fitful activity had to be at once stimulated and sustained by such object-lessons in insanity and its treatment as the sufferings of Norris, the strange hysteria of Chatham, and the incapacity of George III could supply,—against the stern resistance and the material resources of the culprits to whom inquiry meant exposure—and latterly against the conservatism of the House of Lords—the policy of Tuke and of Shaftesbury has prevailed, and a really comprehensive and symmetrical measure has been produced.

The new Bill embodies most of the suggestions made by the Dillwyn Committee.

1. From Scotch procedure (24 & 25 Vict. 54. 14: 29 & 30 Vict. 51. 4) it borrows the principle that the committal of a lunatic to any asylum or licensed house should be a magisterial act.

2. It provides for cases of urgency on the principle of the Scotch 'Emergency Certificate.'

3. It brings every lunatic under confinement into a closer relationship with those who exercise jurisdiction in lunacy—(*a*) by giving to a lunatic committed under a magisterial order, without a personal examination by the committing magistrate, a general right to insist upon being taken before an independent judge, magistrate, or justice; (*b*) by requiring medical superintendents to report to the Commissioners of Lunacy upon the bodily and mental condition of every patient within one month after the date of his reception; (*c*) by making the continuance of the order of detention depend

upon the regularity and the satisfactoriness of subsequent periodical reports; (*d*) by providing that letters written by patients in any asylum or licensed house to the Lord Chancellor, or any Judge in Lunacy, or to a Secretary of State, a Commissioner or a Visitor in Lunacy, or to a committing magistrate, shall be forwarded unopened, by the medical superintendent or proprietor, under liability to a penalty not exceeding £20 for each offence; and (*e*) by enabling *any person* to apply to the Commissioners for authority to have a patient medically examined, with a view to his discharge if improperly detained.

4. Power is given to the Court to appoint a committee of the estate only of any person who, upon inquisition, is found capable of managing himself, but incapable of managing his affairs.

5. The new Bill contains a most salutary provision, which has long been demanded, and will be heartily welcomed, by the whole medical profession,—to the effect that any person against whom an action is brought for having improperly granted certificates of lunacy may have it arrested in its preliminary stages and dismissed upon terms, by satisfying a Judge of the High Court that he had acted *bona fide* and with reasonable care.

A. W. R.

Per and Post.—Most students of Elizabethan law must have been perplexed by the constantly recurring phrases 'in in the per' and 'in in the post,' sometimes for brevity written 'in the per' and 'in the post.' The explanation will, I believe, be found in the forms of the old writs of entry.

If a disseisor (in which word I include an abator, intruder, and the like) made a feoffment, or died seised so that his heir inherited the land, the entry of the feoffee or heir was lawful, as he had a right to the possession, and the form of the writ for the recovery of the land by the rightful owner was for the recovery of land held by *A* 'in quam non habuit ingressum nisi per *B* (the original disseisor).' Similarly, if the heir of the feoffee or the feoffee of the heir of the disseisor was in possession the writ took the form 'in quam non habuit ingressum nisi per *B* cui *C* (the disseisor), &c.' In other cases where a writ of entry lay, the writ stated that the tenant 'non habuit ingressum nisi post, &c.' The writs were said to be 'in the per,' 'in the per and cui,' and 'in the post.'

It followed that persons claiming under the propositus by feoffment or inheritance were said to be 'in the per,' while those claiming in any other manner, e. g., by the limitation of a use, as tenant in dower, as tenant by the curtesy, as the lord taking by escheat or forfeiture, as a recoveror, as a corporation sole taking on the death of his predecessor, were said to be 'in the post.'

It will be observed that, except in the case of the heir, the distinction is that persons in the per take by the act of the party at common law unassisted by Statute, while persons in the post take by operation of law without any act of the party, or by his act aided by Statute. I ought perhaps to add that I have been unable to find any authority as to the effect of a common law assurance other than a feoffment.

See as to all these points Co. Lit. 237 et seq., 2nd Inst. 153, Lincoln College's Case 3 Rep. 58 b.

H. W. E.

Stonor v. *Fowle*, 13 App. Cas. 20, is a remarkable example of the way in which eminent judges may go wrong. The House of Lords in this case reverse the decision both of the Queen's Bench Division and of the Court of Appeal, and no careful reader can doubt that the decision of the House of

Lords is right and the judgments of the Courts below wrong. The difference of opinion, it should be noted, arose upon a question not of law but of fact. The inferior Courts held that a County Court judge had made an order for committal in respect of a possible future default in the payment of a debt. The House of Lords held that the order was for commitment in respect of a past default in payment of £20. On the one view of the facts the members of every court before whom the question came considered the order invalid. On the other view, with all but equal unanimity, they considered it valid. If the right to imprison for debt is to be retained it is most desirable that orders for commitment should not be set aside on frivolous or technical grounds. Whether the power to imprison for debt is to be retained depends on the answer to the enquiry whether it is desirable to increase a poor man's opportunity of buying on credit.

No case recorded in this quarter's reports has excited so much attention as the *G. W. Ry. Co.* v. *Bunch*, 13 App. Cas. 31. Mrs. Bunch's triumph over the company has been celebrated in every newspaper throughout the kingdom. It is useless therefore to recapitulate the facts of the law suit; it is worth while, however, noting one or two points which may escape lay readers. First, the *G. W. Ry. Co.* v. *Bunch* determines no principle of law whatever: a passenger, whether male or female, who follows Mrs. Bunch's example may, it is likely enough, not achieve Mrs. Bunch's success. Secondly, the sole question for the House of Lords was whether the County Court judge, acting the part of a jury, could under any supposition find a verdict in favour of the plaintiff. Once let this principle be grasped and the decision of the House of Lords follows as an inevitable conclusion from the premises. The only point of view in which the case has any legal importance is the doubt it throws upon the judgment of the Court of Appeal in *Bergheim* v. *The G. E. Ry. Co.*, 3 C. P. D. 221. The doubt seems to be reasonable, and companies may probably find their liability for loss of luggage placed in a carriage greater than they have hitherto supposed. Thirdly, admirers of Lord Bramwell—and among this class must be placed every lawyer and layman who respects honesty, vigour, common sense, and humour—must regret the extent to which his lordship is unconsciously becoming the advocate of every company. On grounds which in themselves are defensible enough, Lord Bramwell objects to the law of England with regard to the liability of employers, and appears to be incapable of fairly applying a principle of law which he believes to be unfair. Even if companies were always morally in the right his lordship's attitude would from a judicial point of view be unfortunate, but to defend the interests of corporations is not always the same thing as an 'effort for law and justice.' In these days, however, when sentiment is too often allowed to overrule honesty, the public will go on admiring or pardoning a judge whose worst fault is an invincible bias towards what he holds to be the cause of common fairness.

The judgment of the Court of Appeal in *The Bernina*, 12 P. D. 58, is briefly and decisively affirmed in the House of Lords, *nom. Mills* v. *Armstrong*, 13 App. Ca. 1. No attempt is made in the leading opinion, Lord Herschell's, to exhaust the subject of what is sometimes called 'contributory negligence of a third person;' nor can it be said that this is done by the opinion prepared by Lord Bramwell and relegated to a long footnote, though it is a sufficiently discursive one. And it seems desirable to be content for the present with observing that the supposed authority of *Thorogood* v.

Bryan is now finally cleared out of the way, and the points which remain undecided must be discussed, when the occasion arises, on broader principles.

From a legal point of view *Finlay* v. *Chirney*, 20 Q. B. Div. 494, is the most interesting decision which has been reported for a long time; it fills up a singular gap in the law as to the survival of actions, and determines that an action for breach of promise of marriage does not survive against the personal representative of the promisor. The oddity of the thing is that though it has long been decided that such an action will not survive to the representatives of the promisee (*Chamberlain* v. *Williamson*, 2 M. & S. 408), the particular point raised in *Finlay* v. *Chirney* has not hitherto come definitely before the Courts, or if it has arisen has never been reported. This is one of those instances which excite in the minds of legal theorists some regret that the judges do not deal with the many speculative points which a case often suggests. The judges are not infallible, but they are far more competent both to expand and expound the law than are legislators who are always ignorant and generally prejudiced, or lawyers who being consulted or retained on a particular side, are inevitably biassed even if they be not ignorant. To anyone who reflects on the growth of English law it may appear a plausible theory that the country would gain much by the extension of judicial and the curtailment of Parliamentary legislation. The natural regret that modern judges do not more frequently give full expositions of the law will be certainly increased by a study of Lord Esher's and Lord Justice Bowen's judgments in *Finlay* v. *Chirney*; they are different in style, the one deals with the practical, the other with the historical side of the question before the Court. Lord Justice Bowen's judgment is as admirable a criticism of the history and meaning as regards English law of the maxim '*actio personalis moritur cum personâ*' as can be found in any judicial utterance or book. Every line in it is suggestive of thought and reflection.

Cooper v. *Cooper*, 13 App. Cas. 88, is a Scotch case, but deals with two matters which are of wider interest than enquiries depending for an answer on peculiarities of the law of Scotland. The House of Lords decide in the first place, that it is competent for the House when sitting as a Scotch Court of Appeal, to take judicial notice of English and of Irish law. This doctrine conforms to precedents and to common sense, yet as a matter both of theory and occasionally of practice it may give rise occasionally to curious difficulties. Their lordships, when hearing Scotch appeals, are as much a Scotch Court as is the Court of Session, and logically it is not easy to see why it is more competent for the House of Lords than for the Court of Session to take judicial notice of English or Irish law. The common sense answer, no doubt, is that their lordships are the most eminent English lawyers, and that it were ridiculous for them to ignore their own knowledge and seek information from inferior authorities. This reply, like most of the solutions supplied by common sense, does not reach the bottom of the difficulty. When their lordships sit as a Court of Appeal for England they will, we presume, take judicial notice of Scotch law, but it were mere flattery to suppose that the majority of their lordships can on a question of mere Scotch law compare as experts with the judges of the Court of Session. Meanwhile, historians, if they ever thought it worth while to study law as a portion of history, would do well to note how much the position of the House of Lords as a final Court of Appeal has done to consolidate the union betwixt Scotland and England.

Cooper v. *Cooper*, in the second place, decides that where a woman before marriage enters into a marriage contract in the country where she is domiciled, her capacity to enter into such ante-nuptial contract must be determined as regards its effects after her marriage by the law of the country, in the particular case Ireland, where the woman is domiciled before marriage, and where the contract is made. The decision, as far as it goes, is, it is submitted, clearly right. The capacity to make an ante-nuptial contract must depend on the capacity of the contractor at the time when the contract is made, and this in its turn must depend either upon the law of the contractor's domicil or upon the law of the country where the contract is made. It clearly cannot depend upon the law of the country where the woman becomes domiciled on her marriage, for the capacity to make the contract must exist, if at all, at the moment when the contract is made. Unfortunately from a theoretical point of view the judgment of the House of Lords in *Cooper* v. *Cooper* just glances at, but owing to the facts of the case does not decide the one question of speculative difficulty, namely, whether the capacity to contract depends on the law of the contractor's domicil or on the law of the country where the contract is made. The two laws in the particular instance coincided, and every student of law must regret that the marriage contract was executed in Dublin and not in Scotland.

Howard v. *Clarke*, 20 Q. B. Div. 558, curiously illustrates a feature of English procedure which has been constantly overlooked by the eulogists of trial by jury. This neglected fact is the inroad made by the Court on the province which in theory belongs exclusively to the jury. The division of function is known to all the world; the judge decides every matter of law, the jury decide every matter of fact. Now suppose a foreigner well imbued with this elementary maxim had attended the argument in *Howard* v. *Clarke*, consider what he would have found. He would soon have discovered that two questions called for decision. The first was whether in spite of the verdict that *X* had arrested *A* without 'reasonably suspecting' *A* to be a thief there was ***any evidence*** on which the verdict could be rightly found, and that this enquiry would be answered by the Court. This would a good deal stagger our foreigner, say a French lawyer; for he would argue that the question whether there exists any evidence of a circumstance, say the state of a man's belief, is as truly a question of fact as is the enquiry what weight is due to evidence which admittedly exists.

The second question for decision was whether the existence of 'reasonable suspicion' on *A*'s part was a matter for the determination of the judge or for the determination of the jury. Our French critic would be surprised that the question could arise; he would be astounded that it should be decided in favour of the judge; states of mind are, he would argue, facts; and a question whether *X* felt reasonable suspicion of *A* is neither more nor less a question of fact than the question whether *X* intended to cheat *A*. Our French critic would be right in logic; if it be true that questions of fact are always left to the jury, it certainly follows that the existence of reasonable suspicion on the part of *X* is a question for the jury. The conclusion of the argument is false because one of its premises is untrue. It is not true that the jury determine all questions of fact. Judicial innovation has greatly to the benefit of the nation cut down the authority of the jury, and thus preserved trial by judge and jury from destruction.

The increasing wants of the Exchequer, or the increased energy of the Commissioners of Inland Revenue, cause constant additions to cases affecting

the liabilities of tax-payers. *Stevens* v. *Bishop*, 20 Q. B. Div. 442, *Hesketh* v. *Bray*, ibid. 589, both refer to the mode in which the annual value of real property is to be computed under the Income Tax Acts. The first decides that in estimating the annual value of tithe commutation rent-charge for the purpose of charging the owner thereof he has a right to deduct the amount necessarily expended in the collection of the rent-charge. The matter is in itself of no great importance, but the decision may possibly suggest to landowners, whose rent is got in with difficulty, claims to exemption which neither the Courts nor the Legislature may be prepared to sanction. The second of the cases cited certainly shows that a proprietor of landed property may try to strain the exemptions provided by the Income Tax Acts far beyond the intention of Parliament. It was a bold contention that money expended in reclaiming land from the sea and thus adding to its value is money expended in making or repairing an embankment 'necessary for the preservation or protection of land,' and therefore was to be deducted from the amount assessable to duty under 16 & 17 Vict. c. 34, Schedule A, s. 37. The Court easily grasped a distinction undiscernible to the party interested.

The Queen v. *Commissioners for Special Purposes of Income Tax*, 20 Q. B. Div. 549, as reported in the Law Reports, determines a point depending wholly upon the construction of 5 & 6 Vict. c. 35, s. 133, and can hardly be said to raise any question of general interest. As argued, however, the case raised the question whether a mandamus lies of which the aim is in effect to compel the servants of the Crown to repay money received as part of the revenue. Two judges, Justice Field and Justice Grantham, were of opinion that it lies. The soundness of this view is, considering the judgment of the Court of Appeal *In re Nathan*, 12 Q. B. Div. 461, open to the gravest doubt. In any case, readers of the Law Reports have a right to complain that all reference to a point of legal interest fully discussed in a reported case should have been omitted in the report.

In re the Institution of Civil Engineers, 20 Q. B. Div. 621, determines that the Institution of Civil Engineers is a body 'for the promotion of education, literature, science, and the fine arts,' and as such entitled to claim that the annual value or income of property belonging to the body shall be exempted from taxation under 48 & 49 Vict. c. 51, s. 11, sub-s. 3. The decision of the Court of Appeal in this case reverses the judgment of the Queen's Bench Division. The Court of Appeal, moreover, are not unanimous. The result therefore is that the opinion of three judges is overruled by that of two. Laymen will take this as showing the absurd uncertainty of the law. It shows, however, nothing of the kind. No skill in draftsmanship can do away with the difficulty of applying principles to facts. Whether a society such as that of the Civil Engineers is a body 'for the promotion of education, literature, science, or the fine arts,' is one of those enquiries on which the opinion of equally competent men will always be divided. The true moral of such decisions is twofold: first, that the expediency of having more than one Court of Appeal is doubtful; secondly, that Parliament would act wisely in not increasing exemptions to the general rules which determine liability to taxation.

McGregor v. *McGregor*, 20 Q. B. Div. 529, determines that a husband and wife may contract, without the intervention of a trustee, to live apart in consideration of their agreeing not to take legal proceedings against one another, and that though the agreement be a verbal one, the wife may recover under it from her husband arrears of maintenance which have come

due under the agreement, and that this right does not in any way depend upon the Married Women's Property Act, 1882. This decision need not be quarrelled with on the grounds of common sense or of justice; but it illustrates two points worth notice. The first is one to which we have incessantly called attention, namely, the urgent necessity there exists for placing the position of married women on a clear and intelligible basis. The only way in which this can be achieved is to abolish the distinction both as to rights and liabilities between the position of married, and the position of unmarried women. A County Court judge need not be a great lawyer, but he must of necessity know more law than ninety-nine out of every hundred laymen; and the County Court judge who first decided *McGregor* v. *McGregor* held that the Married Women's Property Act, 1882, determined a question with which it had no real concern. It is, in the second place, open to great doubt whether cases such as *Knowlman* v. *Bluett*, L. R. 9 Ex. 307, which are followed in *McGregor* v. *McGregor*, and which cut down the natural meaning of the fourth section of the Statute of Frauds, have not done more harm by confusing the law than they have done good by preventing hardship in individual cases. All the judicial attempts to curtail the effect of the fourth and seventeenth sections are arguments for the total repeal of these celebrated enactments. If they were removed from the Statute-book, the law of contract would be relieved from an infinity of complications.

Wennhak v. *Morgan*, 20 Q. B. Div. 635, decides a matter of considerable interest to the ordinary public, namely that the disclosure of a libel by a man to his wife, and we presume by a wife to her husband, is not such publication as gives ground for an action. The decision itself is clearly right, and nothing but the authority of the House of Lords would convince us that a rule obviously in conformity with common sense was not also sanctioned by common law. The reasons given for the judgment of the Court are less satisfactory than the decision itself. The fiction that husband and wife are one is a rickety foundation on which to base a doctrine not requiring fictitious support. It were far better again to lay down that communications between husband and wife are absolutely privileged than to lay down, as the Court appear to do, that disclosure of a libel is not in a particular case publication. Clearness of language promotes clearness of thought. *A* does publish a libel about *N* when he makes the libel known to *B*, but if *B* is *A*'s wife *A* has a right to make a libel against *N* known to *B*. This is the true state of the case; the more plain the language in which it is put the better. It is false to say that *A* and *B* are one person; it involves confusion to assert that the very same act which is 'publication' in the case of *C* is not publication in the case of *B*.

No part of the law ought to be clearer than the rules regulating the time within which actions can be brought for the recovery of ordinary debts. *In re Hollingshead*, 37 Ch. D. 651, proves that the enquiry when a debt becomes barred by time is, as the law now stands, by no means a simple one. A widow and devisee for life pays interest on a simple contract debt of her testator. To decide whether such payment is a sufficient acknowledgment to keep the right of action alive against all parties interested in remainder, three or four statutes have to be consulted, and it after all turns out that the point in dispute is in reality a new one. With Justice Chitty's decision that such payment of interest keeps the debt alive, we have no quarrel whatever; it is well that simple contract debts should be placed in the

same position in so far as the law allows, as specially debts; as to which see *Roddam* v. *Morley*, 1 De G. & J. 1. But every reasonable man has reason to complain that the legislature and the judges between them have introduced subtleties and complications into a branch of the law which should be as simple as the multiplication tables.

Bidder v. *Bridges*, 37 Ch. Div. 406, belongs to a class of decisions on which any one who studies the law in a scientific spirit must always look with suspicion. It is one of those cases in which the judges have attempted, and perhaps with success, to distinguish cases which seem in substance identical for the sake of cutting down or, if an expressive vulgarism may be allowed, 'whittling away' the effect of a rule of law too well established to be overridden, and it is thought too unreasonable to be fairly carried out. The doctrine maintained in *Pinnel's case*, 5 Rep. 117 a, and in *Cumber* v. *Wane*, 1 Strange 426, has, every ordinary person would suppose, been deliberately affirmed to be good law in *Foakes* v. *Beer*, 9 App. Cas. 605. The doctrine itself that the payment by a debtor of part of a debt actually due cannot be a good consideration for a contract not to take proceedings for the recovery of the residue may or may not be reasonable. It is however intelligible, and if it be held unreasonable should be set aside by the legislature. But the unreasonableness of the rule goes very little way to determine the reasonableness of the Court in refusing to follow it out to its logical consequences. The plain truth is that the method by which the Court of Appeal has diminished the effect of *Foakes* v. *Beer* may promote justice in a particular instance, but strikes at the foundation of that legal certainty which is the only security for legal justice.

Urquhart v. *Butterfield*, 37 Ch. Div. 357, must in its result have grievously disappointed the plaintiff, or rather the legatees whom he represented, and it also must bitterly disappoint every lawyer interested in legal theory. The legatees must have been disappointed, because after attaining a decision in their favour on questions of considerable intricacy and nicety, they lost a large legacy because they could not make out that their testator was domiciled in Scotland. Theorists must feel deep disappointment because the case nearly raises but does not decide one of the most curious problems connected with the conflict of laws, a problem which has been constantly debated by jurists, and has never been solved by any English Court. *D*'s minority is according to the law of his domicil of origin attained at the age of twenty-one; according to the law of the country where he is residing it is attained at fourteen. Is it at fourteen or at the age of twenty-one that he acquires the capacity for acquiring a domicil of choice in the country where he resides? This is the question that would have been raised if the Court had held in *Urquhart* v. *Butterfield* that the testator, Mr. Hoyes, intended to acquire a domicil in Scotland. Unfortunately the Court held, and with good reason, that under no view of the circumstances was he ever domiciled in Scotland. Their decision may put off for a century or more the solution of an enigma which has long harassed everyone occupied in studying the conflict of laws.

A contract made by telegraph is completed at the place whence the telegram accepting an order is despatched. This is the main point decided in *Cowan* v. *O'Connor*, 20 Q. B. D. 640. The decision places contracts by telegraph in the same position as contracts made by letter sent through the post.

The Court of Appeal was clearly right in reversing Mr. Justice Stirling's judgment in *Peek* v. *Derry* (37 Ch. Div. 54). Apart from collateral points which seem to have complicated matters in the Court below the case was a simple one. The directors of a tramway company stated in the prospectus as 'one great feature of this undertaking' that they had the right to use steam power: in fact, at the date of the prospectus they had not the right and knew they had not, but *they expected to get it.* Whether they had reasonable grounds for such expectation or not was a quite irrelevant issue. On a matter of opinion such as that in *Western Bank of Scotland* v. *Addie* (L. R. 1 Sc. App. 145), where the bank's shares were stated to be 'a good investment,' it might be relevant, but not on a matter of fact: yet a great deal of time was wasted in following this false scent.

It will be observed that the Court of Appeal has carried the definition of deceit one step farther. Hitherto it has been doubtful whether the absence of reasonable ground for believing in the truth of one's assertion is a substantive ground of liability, on the principle that *culpa lata dolo aequiparatur*, or is material only as evidence that one did not believe it. Every member of the Court declared himself in favour of the former view, which, whether or not the older authorities really come up to it, is both the more scientific and the more wholesome one.

There is good sense in Sir James Hannen's defence of the phrase 'legal fraud' as expressing 'that degree of moral culpability in the statement of an untruth to induce another to alter his position to which the law attaches responsibility,' thus distinguishing mere recklessness from the darker kind of deliberate fraud. 'Legal' or 'constructive' fraud means and ought to mean something which is not fraud but to which the policy of the law has attached the same consequences; just as in 'constructive delivery' there is a change of possession without actual delivery, or, when goods are in the possession of a bailee, but the bailor also may sue in trespass in respect of them, the bailor is said to have 'constructive possession,' i. e. he does not really possess but he is allowed to have the same remedy as the possessor.

After *Re Almada & Tirito Co.*, Allen's case (36 W. R. 593) following *Re Addlestone Linoleum Co.* (37 Ch. Div. 191: 36 W. R. 227) it must now be taken as settled, so far at least as the Court of Appeal is concerned, that the issue of shares at a discount is *ultra vires* as in effect a return of capital. What then is the position of a *bona fide* transferee of such shares without notice? If the certificates represent the shares to be fully paid up he clearly comes within the doctrine of *Burkinshaw* v. *Nicolls* (3 App. Cas. 1004) illustrated by the recent case of *Re A. W. Hall & Co.* (37 Ch. D. 712), and company and liquidator are alike estopped from treating the shares as other than paid up, but if there is no such representation it would seem that the transferee buys the shares subject to their legal incidents, and one of these is the payment of the full amount in cash. If this is hard, it is not so hard as the case of the transferee who has paid for shares and is refused registration by the directors (*London Founders Association* v. *Clarke*, 20 Q. B. Div. 576). In view of the amendment of company law Lindley L.J.'s observations in *Re Wheal Buller Consols, Ex parte Jobling* (57 L. J. Ch. 333) as to the unsatisfactory state of the law as to directors' qualification may, it is to be hoped, engage the attention of the legislature. A statutory share qualification for directors involving a substantial stake in the company would probably do more to secure *bona fides* in the formation and management of a company than the abolition of £1 shares or government inspection

suggested by Lord Bramwell, or even than the careful precautions against fraudulent prospectuses in Mr. Maclean's company Bill.

It is not only a fair presumption that a father living on affectionate terms with his daughter may be trusted to do his best for her in arranging the terms of her marriage settlement (*Tucker* v. *Bennett*, 38 Ch. Div. 1), but in this case there was ample evidence that she, being of full age and at least ordinary sense, did so trust him. The decision of the Court of Appeal seems quite correct in point of law. Sir James Hannen dissented on the effect of the evidence, treating the question as really one of fact; but as regards the authority and instructiveness of the decision, the facts can only be taken as found by the majority.

Laws, says Hobbes, are like hedges set not to stop travellers, but to keep them in the way. This is more than can be said for that 'mighty maze without a plan,' the Bills of Sale Acts, of which *Re Yates, Batcheldor* v. *Yates* (38 Ch. Div. 112) furnishes the latest illustration. *Re Burdett, Ex parte Byrne* (20 Q. B. Div. 310) and *Monetary Advance Co.* v. *Cater* (20 Q. B. D. 785) come as some encouragement to the harassed bill of sale-holder. Besides these, two decisions stand side by side in the current number of the Q. B. D. apparently (perhaps not really) in conflict as to the effect of misdescription of the grantor's Christian name, *Lee* v. *Turner* (20 Q. B. D. 773) and *Downs* v. *Salmon* (20 Q. B. D. 775). With such a dubious security as a bill of sale, who can wonder that money-lenders are converted into usurers?

Are advertisements for evidence a contempt? In *Pool* v. *Sacheverel* (1 Peere Wms. 675), a case of advertising for evidence to disprove a Fleet marriage, Lord Macclesfield in a considered judgment said, 'It is a reproach to the justice of the nation and an insufferable thing to make a public offer in print to procure evidence, and is tantamount to saying that such persons as will come in and swear, or procure others to swear, such a thing shall have £100 reward, and this in a cause now depending here.' In *Plating Co.* v. *Farquharson* (17 Ch. D. 49) the Court of Appeal questioned *Pool* v. *Sacheverel*, and Jessel M.R. observed that advertisements for evidence, to prove what the advertiser believes to be true, are no subornation of perjury, making the question rather one of *bona fides* than of public policy, a criterion disclaimed by Lord Macclesfield, for he expressly states in *Pool* v. *Sacheverel* that the advertiser was innocent, and puts it upon the justice of the nation being concerned. The advertisement, as the Chancellor observes, 'will come to all persons, rogues as well as honest men.' To succeed, it has only to be made tempting enough, if Charles II's favourite maxim is true, and every man has his price. In *Brodribb* v. *Brodribb & Wall* (11 P. D. 66), an indignant co-respondent offered a 'reward of one hundred guineas for such information as will lead to the discovery and conviction of the instigators of such charges,' a clear contempt as tending to deter witnesses. In the latest case on the subject, *Butler* v. *Butler* (13 P. D. 73), the respondent to a divorce suit had placarded about the village where his wife was living advertisements for evidence calculated to discredit her in the eyes of the public. Butt J. committed him for contempt on the ground that the advertisements were *mala fide*, but expressed an opinion that a *bona fide* attempt to procure evidence in a suit, even by an advertisement offering a reward, was not a contempt. Certainly the practice of the Government in offering rewards in criminal cases may be cited in its favour, and if this is lawfully done, it can

hardly be a contempt for a party charged with a crime to advertise for evidence to prove his innocence. Probably no general rule can be laid down, but each case must depend on its particular circumstances.

In *Pescod* v. *Pescod* (58 L. T. R. 76) two arbitrators had to appoint an umpire. Each named an umpire who was unknown to the other, wrote the name of his nominee on a slip of paper at an hotel, put them in a hat, and got the waiter to draw. Kay J. held this chance mode of selection void on the ground that the umpire so chosen was not known to one at least of the arbitrators to be a fit and proper person. The distinction between this case and *Neale* v. *Ledger* (16 East 51) was that in the latter case each arbitrator nominated an umpire whom the other thought fit, and they then settled it by tossing. The Court upheld the appointment, Lord Ellenborough observing that the mode of appointing twelve jurors out of all those who are returned as fit to serve is by lot.

'Equity,' says Selden, 'is a roguish thing,' but equity will not go so far in the way of roguery as to dispose of its wards' property without their consent either under the Infants Settlement Act or under any autocratic power inherent in itself (*Seaton* v. *Seaton*, 13 App. Cas. 61). This case illustrates how very elementary a point of law may reach our highest Court of Appeal. It also illustrates by the way the inconvenience of the names of cases being not only transposed but transformed in their passage to the House of Lords. Thus in the current number of the Appeal Cases, *Buckmaster* v. *Buckmaster*, *The Bernina*, *Reg.* v. *Judge of Brompton County Court*, have become respectively *Seaton* v. *Seaton*, *Mills* v. *Armstrong*, *Stonor* v. *Fowle*.

Where a will is executed in duplicate and the testator retains one while he deposits the other in the custody of another person, the destruction of the duplicate in the testator's possession revokes the whole. This is a well-established proposition. A will or codicil in the testator's possession and not forthcoming at his death will, in the absence of evidence to the contrary, be presumed to have been revoked. This also is a well-established proposition. *Jones* v. *Harding* (58 L. T. R. 60) combines these two propositions, deciding that where a will is executed in duplicate and at the testator's death his duplicate is not forthcoming, a presumption arises that the duplicate has been destroyed *animo revocandi*. The inclination of Mr. Justice Butt's mind was against such a presumption, but he followed an unreported case, *Luxmore* v. *Chambers*, vouched by counsel. Presumptions which may cause the fact to be found against the truth are to be invoked with extreme caution.

A reformatory boy insisting on his right to go to church (*Taylor* v. *Timson*, 20 Q. B. D. 671) might puzzle the intelligent foreigner, and his surprise would not be lessened if he were told that all Englishmen and Englishwomen (not being dissenters protected by the Toleration Act) are still bound to go to church on Sundays and holydays under pain of ecclesiastical censure. The result of this obligation is that churchwardens cannot keep any inhabitant out of church whatever the accommodation or want of accommodation. They may as delegates of the ordinary assign the seats (*Asher* v. *Calcraft*, 18 Q. B. D. 607), but they cannot exclude anyone who enters for divine service; 'for the church is common to everybody,' as Hussey C.J. said so long ago as the reign of Henry VII. Evidently at that time a seat or stool

was in the nature of a usurpation, for in the absence of a prescriptive right 'anybody,' says the Chief Justice, 'may take the seat out of the church and move it away for his ease and standing, for it is a common nuisance to the people who are there, for on account of such seats they cannot have standing room by reason of such seats in the church.' Standing in church, except for the 'gentry,' was the rule until the Reformation. People in those days stood for hours to see the play, and in all weathers, and thought nothing of it. Whose church-going virtue would now stand the test?

No one can wonder at the proprietor of the 'Morning Post' appealing to the law against an 'Evening Post.' 'The world is wide,' as Bowen L.J. observed, 'and there are many names:' but the dishonest assumption of a name without damage is not actionable. Millions are now invested in a name, yet the Copyright Acts give no protection either to the name of a newspaper or the title of a book. To get protection at common law, a reputation by sale must have been built up and the name have got a currency like that of a stamp on a vendible article. Till then anyone may appropriate it, as the defendant in *Licensed Victuallers' Newspaper Co.* v. *Bingham* (38 Ch. Div. 139: 36 W. R. 433) in fact did. 'As the law stands at present,' says Lindley L.J. in that case, 'I am sorry to say if anyone starts a newspaper under a new name, any other person can adopt the same the next day. That is the law.'

In a lately published book on Montenegro we read that 'un Monténégrin distingué et érudit, M. Bogisich,' has for several years been engaged on a code for Montenegro, which is not yet ready. There are two mistakes in this statement. Mr. Bogišić is not a Montenegrin, and the Civil Code of Montenegro is not only complete so far as he is concerned, but published and promulgated. We hope to give some account of it when a French translation is accessible. Meanwhile those who are anxious for the codification of Hindu and Mahometan law in British India may note that Mr. Bogišić has deliberately abstained from codifying the South-Slavonic customs which still govern the internal economy of Montenegrin families.

The following among other propositions of law have lately been enounced by candidates in an examination for legal honours:—

By leading cases is meant those cases in which principals are laid down by the judges, and which together make up the law of equity.

Powers are used for committing waste, such as cutting timber and opening mines.

You cannot bequeath the residue of Personal Property.

Possession of the deeds is in Equity conclusive evidence of a duly executed mortgage.

A man in his lifetime need not publish a book, but his executor can be made to.

In copyright before publication, the person to whom the copyright belongs may not issue fresh copies of the same till published.

Remoteness of damage is a question for the jury to settle.

Damages must be assessed by the Court; penalties agreed on between parties for breach of contract are illegal.

Damages must not be too trifling, for *de minimis non curat rex.*

A potwalloper was variously defined as

(*a*) a serf:

(*b*) a person so poor as not to be able to provide a fire to boil the kettle on:

(*c*) an official in the north of England who corresponded in position to the town reeve (or Tun-gerefa) in the south. (*Et issint semble que* **Pot-walloper** *fuist de temps arere companion del* **Wapentake**, *que estoit ung* officier terrible *per lopinion de* Hugo, prout per librum istius V. D. patet cui nomen *L'Homme qui rit. Et ad son nosme de* **pot**, testa, *et* **wallop**, agitare, *pur ceo que quate et brandish le* **pot** *deins sa main, come le* **Wapentake** *brandish son* **iron-weapon**: teste V. D. supradicto, loco quo supra. *Et est assavoir que quand il* wallop *son* pot *toutz les Escossois deins le reaulme fuyoient oustre le* First of the Fourth.)

We have lately found ourselves compelled by want of space to delay the publication of several contributions for a longer time than we should have wished; and it is becoming more and more difficult to find room for papers of real merit and interest offered us not only in England, but from British colonies and possessions and from the United States. The difficulty arises in part from the need of preserving a due proportion among different branches of legal science and interests, as well from the absolute limits of our available space; but this latter cause is the more pressing. The only remedy for this state of things would be to increase the bulk of the REVIEW, and an increase adequate to the purpose would be warranted only by a considerable increase of circulation. It is for our contributors and readers to warrant us therein if they will: not that we are on any other score dissatisfied with our existing condition.

The writer of an anonymous Note on the Married Women's Property Act is requested to communicate his name and address to the Editor.

CONTENTS OF EXCHANGES.

(The titles of articles in foreign reviews are given in the original, translated, or abridged in English, without any fixed rule, as appears in each case most convenient for our readers.)

The English Historical Review. No. 10. Longmans, Green & Co.

The campaign of Sedan (W. O'Connor Morris)—Chatham, Francis, and Junius (Leslie Stephen)—The Plantation of Munster, 1584–1589 (R. Dunlop)—The Claim of the House of Orleans to Milan, Part II (Miss A. M. F. Robinson).

The Nineteenth Century. London: Kegan Paul, Trench & Co.

May: The Local Government Bill (Lord Thring)—June: Local Government in France (H. E. the French Ambassador).

The Journal of Jurisprudence. Vol. XXXII, Nos. 376–8. Edinburgh: T. & T. Clark.

No. 376. Art of Legal Composition—Appeals from the Sheriff Court under the Judicature Act—Protection of Infants—Ownership in Land.

No. 377. The Philosophical School of Law—The Chair of Public Law in the University of Edinburgh—The House of Lords—Commerce and Contracts—The trial of Dr. Middleton—Presumption of Life under the Act of 1881—Civil Procedure in New York.

No. 378. Industry and Property—The State and Industry—The Royal Commission on loss of life at Sea, I—The Pawnbrokers' Act—Laws relating to Sunday.

The Scottish Law Review. Vol. IV, Nos. 40–42. Glasgow: W. Hodge & Co.

No. 40. Sheriff Berry's address to the Glasgow Juridical Society (concluded)—Agent for Borrower and Lender.

No. 41. Imprisonment for Debt—Law Agents and Notaries.

No. 42. Lord Herschell's Trustees Bill.

The Canadian Law Times. Vol. VIII, Nos. 3–9. Toronto: Carswell & Co.

Parliamentary Divorce in Canada—The Contracts and Rights of Foreign Corporations—Have the Provincial Legislatures power to appoint new Magistrates? (Marsh).

The Canada Law Journal. Vol. XXIV, Nos. 4–10. Toronto: J. E. Bryant & Co.

Insanity in its relation to marriage (A. Wood-Renton)—The Extradition of Criminals (W. Houston)—The Land Titles Act—Proposal for a Law School—The New Tariff of Fees and Disbursements—Divorce: Separation de Corps (F. Hague)—The Fisheries Treaty—A Problem in the English

law of Arbitration (A. Wood-Renton)—Railway Commission—Libel and Slander (R. V. Rogers)—Provincial Legislation of 1888—The Law of Dower —Divorce—Commission of Real Estate Agents.

The Cape Law Journal. Vol. V, Part 2. Grahamstown, Cape of Good Hope: for the Incorporated Law Society, Josiah Slater.

The Theory of the Judicial Practice: Arrests—Notes on some Controverted Points of Law—Sir Henry Maine—Barristers and Solicitors Abroad —The Authority of Counsel.

Harvard Law Review. Vol. II, Nos. 1–2.

The History of Assumpsit, I–II (J. B. Ames)—The principle of *Lumley* v. *Gye* (W. Schofield)—The Right to follow Trust Property when confused with other Property (S. Williston)—The limits of Sovereignty (A. L. Lowell).

Political Science Quarterly. Vol. III, No. 1. New York: Ginn & Co.

The Bases of Taxation (F. A. Walker)—The Tariff of 1828 (F. W. Taussig) —Control of Immigration, I (R. M. Smith)—The Michigan Salt Association (J. W. Jenks)—Nominations in N. Y. City (A. C. Bernheim)—Laband's German Public Law (J. W. Burgess)—State Statute and Common Law, II (Munroe Smith).

The New Jersey Law Journal. Vol. XI, No. 5. Somerville, N.J.: Honeyman & Co.

Power of Governor to fill vacancies in office.

The Medico-Legal Journal. Vol. V, No. 3. New York.

Criminality (W. G. Stevenson)—Medals of Guislain (H. R. Storer)— The Medical Jurisprudence of Inebriety (Clark Bell, A. R. Dyett, and C. H. Hughes)—Medical Expertism (A. Wood-Renton).

Bulletin de la Société de Législation Comparée. 19e Année. No. 4. Paris.

Bankruptcy Legislation in Germany and Austria (Bufnoir, Challamel, and Lyon-Caen)—Proceedings of the Society and of the Swiss Law Association —Legislative Chronicle: Germany.

Revue Internationale du Droit Maritime. 3e Année. Nos. 9–12. 1887–8. Paris.

Seizure and Sale of Ships (Vidal-Naquet)—Reports of French, English (Govare), Belgian (Jacobs and Maeterlinck), American (Autran and Périé), German (Périé), and Norwegian (Beauchet) Cases.

Journal du Droit International privé. Par M. Clunet. Paris: 1888. 15e Année.

Nos. 1–2. Esquisse du droit international privé (Bar)—Condition des Sociétés étrangères en Italie (Danieli)—Exécution des jugements étrangers en France (Daguin)—Seconds mariages d'époux divorcés en Suède (Olivecrona) —Abordage en droit espagnol (Saint-Marc)—Chronique—Incident du consulat de France à Florence—Affaire des placards sur l'empereur d'Allemagne—Questions et Solutions—Un français naturalisé anglais peut-il être déshérité par son père resté français?—Jurisprudence internationale— Congrès international, Conflit des lois maritimes—Bibliographie—Articles à consulter, &c.

Annales de Droit Commercial. 2ème Année. No. 2, 1888. Paris.

Du droit allemand sur les conflits de lois en matière de lettres de change (Beauchet)—German Commercial and Industrial Law, 1886–7 (Cohn)—L'assurance sur la vie devrait être insaisissable (Editor).

Annales de l'Ecole libre des Sciences politiques. 3e Année. No. 2, 1888. Paris.

The dissensions of the coalition of 1793 (Sorel)—Equatorial Africa: Ogowe, Congo, Zambesi (Poinsard)—Church and State in Russia (Leroy-Beaulieu)—The organisation of political parties in the United States (Ostrogorski)—French Politics at the Congress of Rastadt, 1797–99 (Kœchlin)—De l'application des lois Métropolitaines a l'Algérie à propos de la loi municipale du 5 Avril, 1884 (Godefroy)—Mr. Goschen's Conversion Scheme (Arnauné)—Correspondence.

Revue de la Réforme Judiciaire. 4ème Année. Nos. 2–3. Paris.

Avoué's right to plead (Ch. Bertheau)—Assises correctionnelles (V. Jeanvrot)—Code of Civil Procedure reform (de la Grasserie)—New legislation concerning public worship—Conciliatory proceedings (Bertheau).

Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart. Vol. XV, No. 3, 1888. Vienna.

Fragmente aus einem System des österr. Obligationenrechts (Unger)—Das relative Vollmachtsindossament (de Jonge)—Gedanken zum Begriffe der 'Benachtheiligungsabsicht' im Anfechtungsgesetze (Kornitzer)—Zur Lehre vom öffentlichen Gute nach gemeinem und österr. Rechte (Burckhard).

Archiv für Öffentliches Recht. Vol. III. Nos. 2–3. 1888. Freiburg i. B.

Die Friedenspräsenz des Deutschen Heeres und das Recht des Reichstags (L. v. Savigny)—Das kaiserlich-russische Thronfolge-u. Hausgesetz (Eichelmann)—Compensation for accidents in course of employment (Rosin).

Zeitschrift für Deutschen Civilprozess. Vol. XII. Nos. 1–2. Berlin.

Die Entwickelung des Konkursverfahrens (Endemann)—Ueber die Succession in das Prozessverhältniss (Kohler)—Ueber die gesetzliche Form der Beschwerde (Rintelen)—Ueber die Auferlegung der Kosten der Berufungsinstanz (Marcus)—Ein Beitrag zum Absonderungsrechte des Verpächters (Voss).

Busch's Archiv. Vol. XLVIII. No. 3, 1888. Berlin.

The International Copyright Convention, 1886 (Fuld)—Erstattung der Protestkosten und der eigenen Provision bei Verklagung der Haupt-Wechselschuldner (Ortloff)—Autor-, Patent- und Industrierecht (Kohler).

Beiträge zur Erläuterung des Deutschen Rechts. Vol. XXXII. Nos. 2–3. Berlin: Franz Vahlen.

Ueber die Verpflichtung des Arrestlegers, etc. (Henrici)—Das Autorrecht an Briefen (Fuld)—Ueber die juristische Natur des Anfechtungsrechts, etc. (Meisner)—Der landrechtliche Begriff des Gewahrsams (Jecklin)—Die Kraftloserklärung von Wechselblanketts durch Ausschluszurtheil (Merfeld).

Centralblatt für Rechtswissenschaft. Vol. VII, No. 9. 1888. Stuttgart.

Reviews.

Zeitschrift für das Gesammte Handelsrecht. Vol. XXXIV, New Series. Vol. XIX. Parts 3-4. Stuttgart: Ferdinand Enke.

Die Haftung des Kommanditisten (Schawlb)—Die Proteststunden im Sinne der Allgemeinen deutschen Wechselordnung (Pappenheim)—Commercial law legislation in England, France, Belgium, and Italy.

Archivio Giuridico. Vol. XXXIX, Nos. 5-6. Vol. XL. Nos. 1-2. Pisa.

Actio ex sponsu (Pacchioni)—Per la dottrina del passo necessario secondo il diritto romano (Brugi)—Le sorti del Canone enfiteutico, dopo l'alienazione del fondo (Cogliolo)—Concetto dominante e partizioni scientifiche della statistica moderna (Salvioni)—The codification of the law of negotiable instruments (Vivante)—Introductory lecture upon Roman law (Gabba)—Il termine di un anno stabilito (Castelbolognesi)—La personalità degli schiavi in Roma (Trincheri)—Il diritto nella vita italiana (Tamassia)—La funzione moderatrice nello Stato moderno (Iona)—Il diritto Ferroviario (Manara)—La filosofia giuridica nelle Università (Cogliolo)—A proposito di una recente edizione di Statuti (Chiapelli)—Osservazioni sulla imperscrittibiletà in materia dotale secondo il Codice civile italiano (Bianchi)—Dei caratteri differenziali fra la vendita di cose future (Castelbolognesi)—Letter to Prof. Cogliolo (Fadda)—Review of penal law (Castori).

Il Filangieri. Anno XII, Part I, No. 3. 1888. Milan.

Una lettera di Papa Gregorio 1°: Contribuzione alla storia della cambiale (Tamassia)—Lo statuto italiono e le sue attinenze con le Costituzioni straniere vigenti (Contuzzi)—The International Copyright Conference, Berne, 1886 (Vidari).

Rivista Italiana per le Scienze Giuridiche. Vol. V, Nos. 1-2. Rome: Ermanno Loescher & Co.

Some disputed points in the law of negotiable instruments (Bolaffio)—La legge 14 § 3 D. de alim. rel. cib. leg. 34. 1. Nota (Scialoja)—Sulla misura del contributo dei coniugi ai domestici bisogni (Polacco)—Delle garentie del dominio diretto secondo il codice civile italiano (Mirabelli)—The Commentary of Gaius on the XII Tables (Zocco-Rosa)—L'interdetto Salviano e un rescritto di Gordiano (Schupfer).

Bullettino dell' Istituto di Diritto Romano. Vol. I. No. 1. 1888. Rome.

New Pompeian Tablets (Scialoja, Alibrandi)—Libello di Geminio Eutichete (Scialoja)—Ad Gai. 2, 51 (Ferrini)—Sul così detto *pactum de jurejurando* (Fadda)—*Res mancipi o res mancipii ?* (Bonfante).

La Legge. Anno XXVII. Series IV, Vol. I, Nos. 19-22 Rome.

L'art. 574 del codice civile ed il diritto di proprietà (De Vecchi).

Themis. Vol. XLIX, No. 2. The Hague.

Joint or several liability of partners for penalties (Goudsmit)—Presidiale Bevelschriften tot Beslaglegging (Heemskerk)—Application of general provisions as to legislation, etc. (Léon, *posth.*)—Subrogation in life assurance (Moens)—Domicil (Bergsma)—The draft law of bankruptcy (Goudsmit)—Revision of the Civil Code (Land).

Rechtsgeleerd Magazijn. Vol. VII, No. 3. Haarlem.

Criminal responsibility for acts of third persons (De Leaô Laguna)—The

Summa Codicis of Ugo (D'Ablaing)—De gedwongen tusschenkomst in het burgerlijk geding (van Boneval Faure) — Recent English legislation (Molengraaff).

Revista Forense Chilena. Vol. III, Nos. 3–10. 1887–8. Santiago.

The principal contents of these numbers are commentaries and discussions upon the Chilian codes or projected additions to them. No. 6, at p. 376, contains an incidental notice of Sir Henry Maine's work.

The Law Quarterly Review does not undertake to exchange with or to notice publications which are not of a distinctly legal character.

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.